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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TOM MCGREGOR, Trustee in Bankruptcy for the Estate of PARSONS STEEL INDUSTRIES, INC.,

Petitioner,

vs.

FIRST ALABAMA BANK OF MONTGOMERY, N.A., and EDWARD HERBERT,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Is the *Younger* doctrine of abstention applicable only when the state court action to be enjoined involves an important government interest of the state?

2. Is a federal district court authorized by the relitigation exception to the Anti-Injunction Act, 28 U.S.C. §2283, to enjoin a pending state court proceeding which considered issues which were not, but arguably could have been, raised in an earlier federal action?

3. Is a federal district court authorized by the relitigation exception to the Anti-Injunction Act, 28 U.S.C. §2283, to enjoin a pending state court proceeding in the absence of a showing of entitlement to an injunction under general equitable principles?

4. Is a litigant bound by a judgment to which he is not a party where the parties to that judgment had no authority to represent him?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OPINIONS BELOW

The opinion of The United States Court of Appeals for the Eleventh Circuit is reported at 825 F.2d 1475 and appears as Appendix A hereto; the opinion of the trial court, the United States District Court for the Middle District of Alabama, is unreported and appears as Appendix B hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on August 21, 1987. This Petition for Writ of Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution Of The United States, Amendment V

No person shall be ... deprived of life, liberty, or property, without due process of law;...

Anti-Injunction Act, 28 U.S.C. §2283

A Court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgment.

STATEMENT OF THE CASE

This is the second time this case has come before this Court.[1]

On February 15, 1979, Parsons Steel, Inc., (hereinafter "Parsons-Mobile") its wholly owned subsidiary, Parsons Steel Industries, Inc., (hereinafter "Parsons-Montgomery") and its shareholders, Jim D. Parsons and Melba L. Parsons (hereinafter collectively referred to as "Parsons") filed an action in the Circuit Court for Montgomery County, Alabama, against First Alabama Bank of Montgomery, N.A. (hereinafter "Bank"), its loan officer, Edward Herbert (hereinafter "Herbert"), Michael Orange (hereinafter "Orange"), and OSI, Inc., a corporation owned by Orange, Parsons Steel Industries, Inc., v. First Alabama Bank of Montgomery, N.A. Civil Action No. CV-79-179-G, (hereinafter "State Action"). The State Ac-

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[1] This Court granted a Petition for a Writ of Certiorari filed jointly on behalf of Parsons Steel, Inc., Jim and Melba Parsons and A. Pope Gordon, Trustee in Bankruptcy for the Estate of Parsons Steel Industries, Inc. The Court reversed and remanded the case to the Eleventh Circuit Court of Appeals with instructions. *Parsons Steel Inc., v. First Alabama Bank,* 474 U.S. 518, 106 S.Ct. 768, 88 L.Ed.2d 877 (1986).

tion alleged that loans made to Parsons Steel Industries, Inc. by Bank were forced into default and foreclosed through the actions of Bank, Herbert, Orange and OSI, Inc. The State Action alleged against Bank false representations beginning in January and continuing through December, 1978, breach of fiduciary duty, conversion, and violation of the Uniform Commercial Code in the sale of repossessed collateral. Additional claims including fraud and conversion were made against Orange and OSI.

On April 5, 1979, Parsons Steel Industries, Inc. was adjudicated an involuntary bankrupt. *In Re: Parsons Steel Industries, Inc., a Bankrupt,* Bankruptcy Number 79-173-N. A. Pope Gordon was appointed Trustee.[2] The Trustee eventually succeeded to Parsons Steel Industries' interest in the State Action on motion of Bank.

On May 30, 1979, Parsons-Mobile and Parsons filed a second action against Bank in federal court, *Parsons Steel, Inc., v. First Alabama Bank of Montgomery, N.A.,* Civil Action No. 79-259-N (M.D. Ala. 1981) (hereinafter "Federal Action". Parsons-Montgomery was not a Plaintiff in that lawsuit and neither Herbert, Orange, nor OSI were Defendants. No damages were sought on behalf of Parsons-Montgomery. Parsons-Mobile and Parsons had no authority to file suit on behalf of Parsons-Montgomery since that corporation had been adjudicated a bankrupt and a Trustee appointed.

The Federal Action alleged only that Bank had conditioned an extension of credit upon a requirement of a change in management and ownership in violation of the Bank Holding

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[2] The Trustee of this Estate was appointed under the former 11 U.S.C. §1, et seq. (Bankruptcy Act of 1898) in that the debtor was adjudicated bankrupt prior to October 1, 1979, the effective date of the "new" Bankruptcy Code (11 U.S.C. §101, et seq.). Since that time A. Pope Gordon has been appointed as Bankruptcy Judge for the Middle District of Alabama and his successor as Trustee is Tom McGregor.

Company Act (hereinafter "BHCA") 12 U.S.C. §1972. Bank contended throughout the Federal Action that Parsons-Mobile and Parsons had no standing to bring that action since the damages sought were solely on behalf of Parsons-Montgomery. The district court repeatedly rejected that contention. Bank did not, however, seek to have the Trustee joined as a party to the Federal Action. The district court ordered the issue of liability tried separate from the issue of damages, and after a jury verdict in Plaintiff's favor, Bank's motion for judgment notwithstanding the verdict was granted. The United States Court of Appeals for the Eleventh Circuit affirmed holding that the facts alleged did not constitute a tying arrangement prohibited by the BHCA. *Parsons Steel, Inc. v. First Alabama Bank,* 679 F.2d 242 (11th Cir. 1982).

Bank plead the federal judgment in the State Action and presented its res judicata defense by motion for summary judgment. That motion was denied. The judge assigned to the case later recused himself and Bank presented its res judicata defense by motion to a second state court judge who also ruled that the federal judgment did not bar the State Action.

Beginning January 31, 1983, the State Action was tried for nine days. Bank and Herbert presented evidence in support of numerous affirmative defenses including waiver, consent, estoppel and res judicata. The jury returned verdicts in favor of Trustee in the amount of $2,000,000.00, in favor of Parsons-Mobile in the amount of $1.00 and in favor of the Parsons in the amount of $2,000,000.00. The trial court entered a final judgment on the jury verdict. Bank moved for judgment notwithstanding the verdict and for a new trial.

Prior to a decision on their post-trial motions Bank and Herbert filed this action in federal district court seeking to enjoin Petitioners from collecting the judgment entered in the State Action. Bank's request for injunctive relief was premised on the relitigation exception to the Anti-Injunction Act, 28

U.S.C. §2283, and its contention - previously rejected by the state court - that the judgment in the Federal Action precluded the State Action.

The district court in an unprecedented decision entered judgment in favor of Bank and enjoined Petitioner from further prosecution of the State Action. The district court made no finding that the injunction was necessary to "protect or effectuate" its prior judgment but instead based the injunction solely on its conclusion that the Federal Action barred the State Action although clearly recognizing the two actions involved different causes of action. The district court made no finding that Trustee had been "virtually represented" by the parties to the Federal Action.

The United States Court of Appeals for the Eleventh Circuit affirmed. *First Alabama Bank v. Parsons Steel,* 747 F.2d 1367 (11th Cir. 1984). The majority held that the Anti-Injunction Act, 22 U.S.C. §2283 was an implied exception to the Federal Full Faith and Credit Act, 28 U.S.C. §1738, so that the district court was not required to give full faith and credit to the state court's determination that the judgment in the Federal Action did not preclude the State Action. The majority further held that it was within the district court's discretion to enjoin the litigation of issues which were not but arguably "could have been" litigated in the Federal Action even though Bank awaited a jury verdict on the merits in state court before seeking the injunction. 747 F.2d at 1377. The majority held that the Federal Action plaintiffs were the virtual representatives of Trustee as to his fraud claim but remanded to the district court to determine whether virtual representation existed as to Trustee's UCC claim. *Id.* at 1379. It is critical to note that neither court below found that the Plaintiffs in the Federal Action had authority to represent the Trustee.

In a vigorous dissent, Judge James C. Hill reasoned that the Anti-Injunction Act did not implicitly amend the Federal Full Faith and Credit Act because the two acts can be construed harmoniously. For that reason the district court was required to give full faith and credit to the state court's determination that res judicata did not apply. Judge Hill further opined that the district court erred in granting the injunction because the State Action and Federal Action involved "different parties and, arguably, different causes of action" so that an injunction was not necessary to "protect or effectuate" the earlier federal judgment. In addition, Bank awaited a judgment on the merits in state court before requesting an injunction which further "complicates the relations between state and federal courts." 747 F.2d at 1382.

A Joint Petition for Certiorari filed on behalf of Parsons and the Trustee was granted by this court. In a 9-0 decision, this court reversed the decision of the Eleventh Circuit *Parsons Steel, Inc. v. First Alabama Bank of Montgomery, N.A.*, 474 U.S. 518, 106 S.Ct. 768, 88 L.Ed.2d 877 (1986). In rejecting the Court of Appeal's analysis of the effect of the relitigation exception to the Anti-Injunction Act on the Full Faith and Credit Statute, this court ruled that the possible preclusive effect under Alabama law of the state court judgment should have been considered. This court noted that unlike the several cases in *Toucey v. New York Life Insurance Company,* 314 U.S. 118, 62 S.Ct. 639, 86 L.Ed. 100 (1941), the Bank did not seek an injunction against relitigation in state court until such time as an adverse jury verdict in state court had been rendered against the Bank and the res judicata issue had been decided against it. This court further noted that the case was similar to *Atlantic Coast Line Rail Way v. Locomotive Engineers,* 398 U.S. 281, 90 S.Ct. 1739, 26 L.Ed.2d 234, (1970), which held that the various exceptions to the Anti-Injunction Act did not permit a federal court to enjoin state proceedings more threatening to federal jurisdiction than the circumstances in this case. This Court in remanding the case stated that the district court was in the best posi-

tion to determine and apply Alabama preclusion law in the first instance and if the district court found that the state court judgment was not entitled to preclusive effect under Alabama law and the Full Faith and Credit Act, that the propriety of the federal court injunction should be determined based upon the general principles of equity, comity and federalism as discussed in *Mitchum v. Foster,* 407 U.S. 225, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972).[3]

In accordance with the Supreme Court's decision, the Court of Appeals issued its mandate reversing the district court judgment and remanded for further proceedings in conformity with the Supreme Court opinion. *First Alabama Bank of Montgomery v. Parsons Steel, Inc.,* 785 F.2d 929 (11th Cir. 1986). On remand the district court found that Alabama law did not give preclusive effect to the state court's determination of the res judicata issue because there was no final judgment in that action and that an injunction was proper under principles of equity, comity and federalism. It therefore ordered that its injunction continue in force.

The Court of Appeals affirmed. Although acknowledging that there is no Alabama law on the question of whether a jury verdict is considered a final judgment for preclusion purposes when it is rendered nonappealable by the pendency of post-trial motions, the appeals court held that the district court did not err

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[3] This Court was able to resolve the case at that time on the basis that the Anti-Injunction Act was not an implied exception to the Full Faith and Credit Act. Therefore it did not address the issues, raised by Petitioners, of whether the relitigation exception to the Anti-Injunction Act is intended to allow injunctions in situations where a later state action involved claims that could have been litigated, but weren't actually litigated in the prior federal action or whether the Trustee, not a party to the first federal action, was nevertheless bound under res judicata by the judgment of the District Court in that action. *Parsons Steel v. First Alabama,* 474 U.S. 518, 106 S.Ct. 768, 88 L.Ed.2d 877, 885 (1986) Fn.4.

in finding that there was no final judgment for preclusion purposes under Alabama law. The Court of Appeals further held that the *Younger* doctrine as expressed in *Mitchum v. Foster,* 407 U.S. 225, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972) is not applicable to the facts of this case because the state court action enjoined by the district court does not implicate any important government interest of the State of Alabama. The Court of Appeals held that *Atlantic Coast Line* was distinguishable from the case at bar in that the issue of whether res judicata barred relitigation of issues that could have been raised in the original action was not presented in *Atlantic Coast Line* and that the present case does not involve an improper attempt to seek federal appellate review of a state court decision. (Appendix A, Pgs. A-9, A-15-17). Lastly the Court of Appeals clung to the position that the Trustee was bound by the prior federal action under res judicata principles because it had determined previously that the Trustee was in privity with the parties in the Federal Action. (Appendix A, Pg. A-17). The Court of Appeals opined that a district court has discretion to determine whether federal interference with state proceedings is warranted pursuant to the relitigation exception to the Anti-Injunction Act and within that discretion, a district court can go either way and not be reversed. (Appendix A, Pg. A-19).

REASONS FOR GRANTING THE WRIT

I. The Court Of Appeals Decision Raises Questions Of Federal-State Relations Of Critical Importance Which Must Be Settled By This Court.

There can be no greater intrusion into a state proceeding that what has occurred in this case. The district court's injunction is premised on the conclusion that an earlier federal judgment barred a pending state proceeding. The Bank's request for injunctive relief came only after a nine-day jury trial in state court trying a variety of state law issues wherein a jury verdict on the merits was rendered against the Bank.

This Court determined in *Parsons Steel v. First Alabama Bank,* 474 U.S. 518, 88 L.Ed.2d 877, 106 S. Ct. 768 (1986) that the Court of Appeals (and the District Court) erred in refusing to consider the possible preclusive effect under Alabama law of the state court judgment, noting that the Full Faith and Credit Act requires federal courts give the state judgment the same preclusive effect it would have had in another court of the same state. 88 L.Ed.2d at 884. This court further opined that should the state court judgment not be preclusive under Alabama law that the general principles of equity, comity and federalism as discussed in *Mitchum v. Foster,* 407 U.S. 225, 32 L.Ed.2d 705, 92 S.Ct. 2151 (1972) should be followed.

A. The Court of Appeal's decision erroneously holds that the *Younger* doctrine is only applicable when the state court action to be enjoined invokes an important government interest of the state.

Those principles, as noted in *Mitchum* were canvessed at length in the context of state criminal prosecutions in *Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). Under *Younger,* a federal court should abstain from enjoining an ongoing state criminal prosecution absent a showing of bad faith prosecution or harassment or a showing that the challenged

statute is flagrantly or patently violative of express constitutional prohibitions, *Younger* 401 U.S. at 53-54, 91 S.Ct. at 754-55, 27 L.Ed.2d at 680-81. The district court went to great lengths to make the instant case fall within the *Younger* standards. (Appendix B, Pgs. B-37-48). However, the Court of Appeals held that it was not necessary for the district court to determine that the Petitioner's actions amounted to bad faith and harassment because *Younger* was not applicable to this case, (Appendix A., Pg. A-11). The Court of Appeals held that before *Younger* abstention is appropriate the threshold question of whether the state action enjoined by the district court invokes an important government interest of the state must be answered in the affirmative. (Appendix A, Pg. A-12). The Court of Appeals held that the state court action involved in this case was merely a private action between private parties, and the state of Alabama had no interest beyond "its interest as adjudicator of wholly private disputes "and therefore the *Younger* doctrine did not require that the district court abstain from issuing the injunction against further state court proceedings. (Appendix A, Pg. A-13).

This Court should grant certiorari to consider whether *Younger* abstention is appropriate only where important government interests of the state are involved and whether the administration of a state's judicial system is such an important government interest so as to invoke *Younger* abstention.

B. The Court of Appeal's decision violates this Court's decision in *Atlantic Coast Line Railroad Company v. Brotherhood of Locomotive Engineers,* by expanding exceptions to the Anti-Injunction Act.

The Anti-Injunction Act, 28 U.S.C. §2283, provides:

> A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

The most important decision of this Court interpreting the Anti-Injunction Act is *Atlantic Coast Line Railroad Company v. Brotherhood of Locomotive Engineers,* 398 U.S. 281, 90 S.Ct. 1739, 26 L.Ed.2d 234 (1970). This Court noted in *Parsons Steel* the remarkable similarity between the case at bar and *Atlantic Coast Line* which held that the various exceptions to the Anti-Injunction Act did not permit a federal court to enjoin state proceedings in circumstances more threatening to federal jurisdiction than the circumstances of this case. 88 L.Ed.2d at 884. However, the Court of Appeals attempted to distinguish *Atlantic Coast Line* from the case at bar in two respects in order to find that the federal injunction was proper. (Appendix A, Pgs. A-16-18). The Court of Appeal's analysis is faulty because of the following reasons:

1. The Court of Appeals found that the issue of whether res judicata barred relitigation of issues that could have been raised in the original federal action was not presented in *Atlantic Coast Line.* In the present case the Court of Appeals affirmed the district court's finding that the issues raised in the state court proceedings should have been raised as pendent claims in the BHCA action and therefore were barred under res judicata principles. *Parsons Steel v. First Alabama Bank,* 747 F.2d 1374, 1379. This distinguishment of the cases is based on what Petitioners contend was an erroneous decision by the District and Appeals Court that the issues raised in the state court proceeding should have been raised as pendent claims in the BHCA action and that the Bank "made a strong and unequivocal showing of relitigation". See *Delta Air Lines, Inc. v. McCoy Restaurants, Inc.,* 708 F.2d 582, 585 (11th Cir. 1983). The Court of Appeals further cited its decision of *Woods Exploration & Producing Company v. Aluminum Company of America,* 438 F.2d 1286, 1312 (5th Cir. 1971) cert. denied 404 U.S. 1047, 92 S.Ct. 701, 30 L.Ed.2d 736 (1972) holding that the relitigation exception is applicable to authorize an injunction any time the state proceeding is precluded under the doctrine of res judicata.

Woods Exploration marked the first time a court required no showing that the injunction was necessary to "protect or effectuate" a prior federal judgment but instead approved an injunction of issues which were not but "could have been" litigated in the prior federal action. The expansion of the relitigation exception in *Woods Exploration* is arguably minor since the federal judgment had been in a federal anti-trust action and the state proceeding enjoined was a state anti-trust action. The issues in both cases although arising under different laws were substantively identical.

The United States Court of Appeals for the Seventh Circuit relying on *Woods Exploration* further expanded the relitigation exception in *Harper Plastics, Inc. v. Amoco Chemical Corporation,* 657 F.2d 939 (7th Cir. 1981). In *Harper* the state court defendant had previously obtained a federal judgment that its actions relating to distribution of plastic raw materials did not violate federal anti-trust laws. The plaintiff then filed a complaint in state court alleging the same facts but basing recovery on breach of contract under state law. The Seventh Circuit, citing *Woods,* held that the state law contract claim could have been joined with the earlier federal claim so that it was now within the district court's discretion to enjoin the state action.

In this case the lower courts, relying on *Woods* and *Harper,* have stretched the relitigation exception to the point of destroying the independent nature of state courts. The district court made no finding that its injunction was necessary to "protect or effectuate" its prior judgment and specifically recognized that the federal and state action involved different causes of action. In addition the injunction extends to the Trustee whose only opportunity to fully and fairly adjudicate his claims came in state court.

Although *Woods* and *Harper* represent injunctions of doubtful necessity to "protect or effectuate" a prior federal judgment the injunctions in those cases were much less intrusive into state

court function than the injunction in this case because they were issued in the early stages of the state court proceedings. Neither of the courts in those cases sat in direct review of a state court by resolving an issue which that court had previously resolved nor did those courts enjoin litigants who were not parties to the federal judgment and who had had no prior opportunity to litigate their claims.

2. The Court of Appeals also attempted to distinguish *Atlantic Coast Line* by finding that the case at bar did not involve an improper attempt to seek federal appellate review of a state court decision because the state action was not final at the time the district court issued its injunction in this case. (Appendix A, Pg. 16). The Petitioners contend that the Court of Appeals finding that the state court jury verdict on the merits was not a final judgment for preclusion purposes under Alabama state law was erroneous. This finding is premised on the fact that the pendency of post trial motions rendered the action not final for purposes of appeal and that in order for a state court judgment to be final for preclusion purposes it must also be final for purposes of appeal. (Appendix A., Pg. 8). However, even if the Court of Appeals was correct, this Court must look at the reason the state judgment was not final for appeal purposes. It was because Bank filed the post-trial motions for new trial and judgment notwithstanding the verdict. After filing those motions, the Bank filed its action in federal court seeking to enjoin further state proceedings. It is obvious that the Bank was displeased with the results in state court and specifically the state court's rulings concerning the res judicata effect of the federal BHCA action on the state action. The filing of the action for injunctive relief was a mere ruse to actually seek federal appellate review of a state court decision, an action strictly proscribed by this Court in *Atlantic Coast Line,* 398 U.S. at 293.

The general principles of comity, equity and federalism should bar the issuance of such an injunction against this Petitioner. As noted by this Court in *Parsons*:

> "In each of the several cases involved in *Toucey,* the prevailing party in the federal action sought an injunction against relitigation in state court as soon as the opposing party commenced the state action and before there was any resolution of the res judicata issue by the state court. In the instant case, on the other hand, Respondents (Bank) chose to fight out the res judicata issue in state court first and only after losing there did they return to federal court for another try.

89 L.Ed.2d at 884.

However the Court of Appeals found that this Court did not question the earlier affirmance of the District Court's finding that the Bank was excused for failing to seek an injunction at an earlier point in the state proceedings. (Appendix A, Pg. A-21, n.8).

Petitioner has contended throughout this case that the Bank waited too late to file an action for injunctive relief in federal court. This contention is supported by the case of *Rosado v. General Electric Circuit Breakers,* 805 F.2d 1085 (1st Cir. 1987). The Bank has continually argued that the Trustee was in privity with the other Plaintiffs in the federal action and that the state action involved improper claim splitting and therefore the state action should be barred by res judicata. *Rosado* holds that a Defendant consents or acquiesces to claim splitting when, while two actions on the parts of the same claim are pending, he fails to object to the claim splitting. If after judgment enters on one of the two, the Defendant then moves to dismiss the second on res judicata grounds, the motion should be denied. The purpose behind the principles of res judicata is to protect a Defendant from harassment of multiple actions and a Defendant who fails to timely complain of claim splitting waives that benefit. This holding is in accord with the Restatement (Second) of Judgments §26 comment (a) illustration 1. *Rosado* supports the Petitioner's contention that the Bank waived its right to injunc-

tive relief by waiting too long. Therefore, the only reasonable and equitable decision would have been to deny the Bank's request for injunctive relief and allow the challenge to the correctness of the state court's determination as to the conclusive effect of the federal judgment to be pursued by way of appeal through the state court system and certiorari from this court.

The seriousness of federal judicial interference with state civil functions has long been recognized by this court. This court has consistently held that when federal courts are confronted with requests for such relief, they should abide by standards of restraint that go well beyond those of private equity jurisprudence. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 603, 95 S.Ct. 1200, 43 L.Ed.2d 482, 492 reh. denied, 421 U.S. 971, 95 S.Ct. 1969, 44 L.Ed.2d 463 (1975).

II. The Decision Below Deprived The Trustee Of A Full And Fair Opportunity To Litigate His Claims In Violation Of The Requirements Of Due Process.

At a minimum due process of law requires that a litigant be afforded the opportunity to present evidence and argument in support of his claims. *Blonder-Tongue Laboratories, Inc. v. University of Illinois,* 402 U.S. 313, 329, 91 S.Ct. 1434, 1443, 28 L.Ed.2d 788, 799 (1971). Consequently, one is not bound by a judgment in litigation in which he is not designated as a party or to which he has not been made a party unless he is in fact adequately represented by parties who are present with the authority to represent him. *Hansberry v. Lee,* 311 U.S. 32, 61 S.Ct. 114, 85 L.Ed.2d 22 (1940).

In *Montana v. United States,* 440 U.S. 147, 59 L.Ed.2d 210, 99 S.Ct. 970 (1978), this Court considered the circumstances under which a non-party can be bound by prior litigation. In that case a contractor on a federal project filed an action in Montana state court alleging that a gross receipts tax on public, but not private construction projects, violated the United States

Constitution by discriminating against the federal government and companies which dealt with it. The tax was ultimately upheld as constitutional by the Supreme Court of Montana. Subsequently, the United States filed an action in United States District Court and a three judge panel held that the gross receipts tax violated the supremacy clause. On appeal this Court reversed and held that the United States, although not a party to the state court litigation, was bound by it because the United States had a sufficient "laboring oar" in the conduct of that litigation. In reaching that decision this Court noted the undisputed evidence that the United States required the state court lawsuit to be filed, reviewed and approved the complaint, paid attorneys' fees and costs, directed the appeal and filed an amicus brief. By directing the state court litigation the United States had a full and adequate opportunity to litigate the issues and was therefore bound by that court's decision.

In the instant case the courts below did not, nor could they, find that the Trustee had a "laboring oar" in the Federal Action. The Trustee played no role in the decision to file that action, did not participate in any manner in that action and did not contribute toward attorneys' fees or expenses.

In the absence of virtual representation the Courts below found that the Trustee was the Federal Action Plantiff's "privy" and that he could have intervened in the Federal Action.[4] The parties to the federal action had no authority to represent - and did not attempt to represent - Parsons-Montgomery. These parties sought only to recover damages they suffered separate and distinct from Parsons-Montgomery. Although the Bank on several occasions argued that the Federal Action plaintiffs had suffered no damages separate from the bankrupt corporation and therefore had no standing to bring

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[4] The use of the term "privy" in the context of preclusion of non-parties "has been criticized as conclusory and analytically unsound." *Montana v. United States,* 440 U.S. at 154, n.5.

that action the district court rejected that argument. Since no claims were made on behalf of the bankrupt corporation in the federal action there was no reason for the Trustee to intervene.

The Court of appeals however placed great emphasis on the Trustee's knowledge of the Federal Action and his choice not to intervene in finding that the Trustee was in privity with the parties to the Federal Action. Trustee contends that his failure to intervene should not have been fatal. In *Atlantic Coast Lines* this Court held that while "the *Railroad* could probably have based its federal case on the pendent state law claims as well, it was free to refrain from doing so and leave the state law questions and related issue concerning preclusion of state remedies by federal law to the state courts." 398 U.S. at 295. Likewise, the Trustee should not have had to intervene in the Federal Action to protect the bankrupt estate's interests.

Writing for a unanimous court in *Blonder-Tongue v. University of Illinois,* Justice White stated:

> Some litigants - those who never appeared in a prior action - may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position.

402 U.S. at 329. The Trustee in this case has been denied due process of law. His only chance to present evidence and argument on his claims occurred in the State Action. The district court's unprecedented injunction denying him the right to proceed to collect the damages awarded him in that action denies due process of law. This Court should grant certiorari to protect the Trustee's only opportunity to fully and fairly litigate his claim.

III. This Court Should Grant Certiorari To Resolve A Conflict Between The Circuit Courts Of Appeals Created By The Decision Below.

As noted in the previous Petition for Certiorari the Court of Appeal's opinion represents the first time a court has found virtual representation in the absence of a finding that the party to be estopped expressly or impliedly authorized a party to represent him in prior litigation. That decision creates a conflict among the circuit courts of appeals which this Court should resolve.

In *General Foods Corporation v. Massachusetts Department of Public Health*, 648 F.2d 784 (1st Cir. 1981) the Court of Appeals for the First Circuit held that in order to be virtually represented a party must expressly or impliedly grant another party authority to represent him.[5] In that case two food companies, General Foods Corporation and Rich-SeaPak Corporation brought an action against the Massachusetts Department of Health challenging the constitutionality of state regulation of food labeling. The defendant claimed that an earlier state court judgment in an action brought by two trade associations precluded that action. The district court dismissed the federal action on res judicata grounds. On appeal the court of appeals held that because General Foods had been a member of both trade associations and had contributed $2,500.00 toward expenses of the earlier litigation it had expressly or impliedly authorized the trade association to represent it and for that reason was bound by the prior judgment. The court reversed however as to Rich-SeaPak Corporation because that corporation had neither been a member of either trade association nor in any manner directed the prior litigation.[6]

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[5] This definition of virtual representation accords with the Restatement of the Law of Judgments §41(1)(b).

[6] The United States Court of Appeals for the Second Circuit reached a similar conclusion in *Expert Electric Company v. Levine*, 545 F.2d 1277 (2nd Cir. 1977).

Similarly in *Humphreys v. Tann,* 487 F.2d 666 (6th Cir. 1973), cert. denied, 416 U.S. 956, 94 S.Ct. 1970, 40 L.Ed.2d 307 (1974), the Sixth Circuit Court of Appeals permitted a plaintiff to sue the owner of an airplane involved in a mid-air collision even though an earlier suit had relieved the owner of liability. Even though the attorney for the plaintiff had participated in pretrial discovery and litigation conferences for the first trial the Court of Appeals for the Sixth Circuit permitted the plaintiff to have a separate day in court to try his theory of liability.

In *Del Mar Avionics v. Quinton Instruments Company,* 645 F.2d 832 (9th Cir. 1981) the Ninth Circuit Court of Appeals held that an instrument manufacturer was barred from relitigating a patent infringement issue which had been resolved in an earlier action against the manufacturer's distributor. Since the manufacturer had authorized its distributor to represent it in those issues and had directed the prior litigation it had had its opportunity to fully and adequately litigate those issues.

Each of these cases includes as an element of the definition of "virtual representation" the requirement that a party to the prior litigation act with implied or expressed authority of the party now sought to be bound. In the instant case the Eleventh Circuit Court of Appeals has eliminated that element and in doing so has created a new definition of "virtual representation". Because its new definition is in conflict with prior decisions of the First, Second, Sixth and Ninth Circuit Courts of Appeal this Court should grant certiorari to resolve that conflict.

CONCLUSION

The issues presented by this case again strike at the heart of our federal system by expanding the relitigation exception to the Anti-Injunction Act and by allowing a federal court to sit in direct review of a state court decision. The courts below have upset the balance between our co-existing independent court systems. When friction arises between these two systems this Court must resolve the conflict. The Petition for Certiorari should therefore be granted.

Respectfully Submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Nos. 85-7343, 86-7506

First Alabama Bank of Montgomery, N.A.,
and Edward Herbert,
Plaintiffs-Appellees,

v.

Parsons Steel, Inc., Jim D. Parsons, Melba L. Parsons,
and Parsons Steel Industries, Inc.,
Defendants,

Tom McGregor, as Trustee in Bankruptcy for Parsons
Steel Industries, Inc.,
Defendant - Appellant.

Parsons Steel, Inc., Jim D. Parsons, Melba L. Parsons,
and Parsons Steel Industries, Inc.,
Defendants - Appellants

Tom McGregor, as Trustee in Bankruptcy for
Parsons Steel Industries, Inc.,
Defendant - Appellant.

August 21, 1987
Appeals from the United States District
Court for the Middle District of Alabama

Before HILL AND JOHNSON, Circuit Judges, and HENLEY,* Senior Circuit Judge.

JOHNSON, Circuit Judge:

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* Honorable J. Smith Henley, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

This consolidated appeal challenges the propriety of the district court's continuance of an injunction issued in favor of Appellees, First Alabama Bank ("First Alabama") and bank officer Edward Herbert against further prosecution of a state court action filed against Appellees by Appellants Parsons Steel, Inc. ("Parsons-Mobile"), Jim D. and Melba Parsons ("Parsons"), and Tom McGregor, trustee in bankruptcy of Parsons Steel Industries, Inc. of Montgomery ("Parsons-Montgomery") in the Circuit Court of Montgomery County, Alabama.[1] All Appellants challenged the district court's order continuing the injunction in force. McGregor also appeals the district court's order refusing to modify the injunction to allow him to pursue a UCC claim in state court. We affirm.

I. BACKGROUND

This case arises out of a series of bank transactions involving First Alabama and Parsons-Montgomery, a wholly owned subsidiary of Parsons-Mobile, ninety-nine percent of the stock of which is in turn owned by Parsons. This is the third time this Court has been called upon to review judgments in litigation arising out of those transactions.

In the fall of 1978, Parsons-Montgomery owed First Alabama one million dollars in secured debt. Anticipating that Parsons-Montgomery would not be able to pay this debt, Parsons and First Alabama discussed possible refinancing or sale of the business. After one attempt to sell failed, First Alabama contacted one of its customers, Michael Orange. Orange did not want to purchase the ocmpany but agreed with Parsons in December 1978 to manage the company for a fee and stock option. Orange soon resigned, and First Alabama commenced foreclosure proceedings against Parsons-Montgomery in January 1979 and sold its assets at a private sale to OSI, Inc., Orange's corporation, for the amount of the outstanding debt.

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[1] *Parsons Steel Industries, Inc. v. First Alabama Bank of Montgomery, N.A.*, Civil Action No. CV-79-179-G.

On February 15, 1979, Parsons-Montgomery, Parsons-Mobile, and Parsons filed suit in Alabama circuit court against First Alabama, Herbert, Orange and OSI, alleging that First Alabama fraudulently forced Parsons to allow Orange to take control of Parsons-Montgomery, and eventually to obtain complete ownership of the company. Orange and OSI eventually were dismissed from the suit pursuant to a pro tanto settlement in January, 1983.

On April 5, 1979, Parsons-Montgomery was adjudicated an involuntary bankrupt. On May 30, 1979, Parsons-Mobile and Parsons filed suit in federal court against First Alabama alleging that the same actions of First Alabama that gave rise to the state lawsuit violated the Bank Holding Company Act, 12 U.S.C.A. §§1971 to 1978 ("BHCA"). Parsons-Montgomery and its trustee were not original parties to the federal action, and the trustee chose not to join the action. The trustee was made a party to the state court action pursuant to First Alabama's motion alleging that he was an indispensable party. The trustee participated in joint discovery that was designated for use in both the state and federal action.

The federal action was bifurcated and proceeded to judgment before the state action. After a jury verdict in favor of the plaintiffs, the district court entered a judgment n.o.v. for First Alabama in June 1981. This Court affirmed. *Parsons Steel, Inc. v. First Alabama Bank of Montgomery,* 679 F.2d 242, 246 (11th Cir. 1982) ("Parsons I"). Appellees asserted the federal judgment as res judicata in the state action through motions to dismiss and for summary judgment which were denied by the state court. On June 11, 1982, the trustee filed an amended complaint in the state action which alleged for the first time that First Alabama's sale of the assets of Parsons-Montgomery was commercially unreasonable in violation of Article 9 of the Uniform Commercial Code ("UCC claim"). Shortly before the state trial was scheduled to begin, the state court entered a judgment in limine stating that the res judicata issue was not ap-

propriate for presentation to the jury.[2] The state trial commenced January 31, 1983. Appellees moved for directed verdict at the close of the plaintiff's case and at the close of all the evidence, asserting res judicata and collateral estoppel. Both motions were denied. The jury returned a verdict for Appellants in the amount of $4,000,001.00. On February 24, 1983, Appellees filed motions for judgment n.o.v. and a new trial asserting as one basis for judgment n.o.v. the preclusive effect of the prior federal judgment.

On March 7, 1983, Appellees filed a complaint in federal court seeking to enjoin further prosecution of the state court action on the basis of res judicata and collateral estoppel. On June 15, 1983, the district court enjoined further prosecution of the state court action by Appellants finding that the claims raised in the state court action by Appellants finding that the claims raised in the state court proceedings should have been raised in the federal proceeding and that the trustee, although not a party to the federal action, was in privity with those parties and, therefore, bound by the judgment in the prior federal action as well. At the time of issuance of that injunction, Appellees' motions for judgment n.o.v. and for a new trial were still pending in the state court action. The state court stayed the action in accordance with the injunction on July 6, 1983.

This Court affirmed the district court's decision, except with regard to the district court's determination that the trustee was precluded by the prior federal action from pursuing his UCC

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[2] The order indicated that the state court was "of the general impression that the issue of res judicata is an issue properly to be decided by the Court rather than an issue to be presented to and decided by the jury" and that "[t]his proposition would be especially true where, as in the instant case, the factual issues have been fully presented to the Court in the course of Motions to Dismiss, Motion for Summary Judgment and Motion for Reconsideration of Motion for Summary Judgment and that the facts as regards the issue of res judicata are clearly undisputed."

claim. *First Alabama Bank of Montgomery v. Parsons Steel, Inc.*, 747 F.2d 1367, 1381 (11th Cir. 1984), rev'd, 474 U.S. 518, 106 S.Ct. 768, 88 L.Ed.2d 877 (1986) ("Parsons II"). The Court remanded that issue to the district court "for further fact findings to determine whether the injunction should be modified to allow the Trustee to pursue his UCC claim based only on the actual foreclosure sale." *Id.* The *Parsons II* Court held that issuance of the injunction was proper under relitigation exception to the Anti-Injunction Act,[3] which generally prohibits a federal court from enjoining state proceedings, but excepts from that prohibition, inter alia, injunctions "necessary ... to protect or effectuate its judgments." *Id.* at 1375. The Court found that the district court's independent determination as to the res judicata effect of the BHCA action was not precluded by the state court's prior determination of that issue because the relitigation exception to the Anti-Injunction Act modified the Full Faith and Credit Statute[4] so that "while a federal court is generally bound by other state court determinations, the relitigation exception empowers a federal court to be the final adjudicator as to the res judicata effects of its prior judgments on a subsequent state action." *Id.* at 1375-76.

The Supreme Court reversed. *Parsons Steel, Inc. v. First Alabama Bank of Montgomery*, 474 U.S. 518, 106 S.Ct. 768, 773, 88 L.Ed.2d 877 (1986) ("Parsons III"). It rejected this

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[3] The Anti-Injunction Act provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C.A. §2283.

[4] The Full Faith and Credit Statute provides in pertinent part that "judicial proceedings ... shall have the same full faith and credit in every court within the United States ... as they have by law or usage in the courts of such State ... from which they are taken." 28 U.S.C.A. §1738.

Court's analysis of the effect of the relitigation exception to the Anti-Injunction Act on the Full Faith and Credit Statute, finding that the two provisions could be read consistently by "limiting the relitigation exception of the Anti-Injunction Act to those situations in which the state court has not yet ruled on the merits of the res judicata issue" and that "[o]nce the state court has finally rejected a claim of res judicata, then the Full Faith and Credit Act becomes applicable and federal courts must turn to state law to determine the preclusive effect of the state court's decision." *Id.* at 772. The Supreme Court thus found that this Court had erred in failing to consider the possible preclusive effect under Alabama law of the state-court judgment. *Id.* It further found that the district court was in the best position to determine and apply Alabama preclusion law in the first instance and, if the district court found that the state-court judgment was not entitled to preclusive effect under Alabama law and the Full Faith and Credit Act, "it would then be in the best position to decide the propriety of a federal-court injunction under the general principles of equity, comity, and federalism ..." *Id.* at 773.

In accordance with the Supreme Court's decision, this Court issued its mandate reversing the district court judgment and remanding for further proceedings in conformity with the Supreme Court opinion. *First Alabama Bank of Montgomery v. Parsons Steel, Inc.*, 785 F.2d 929 (11th Cir. 1986). On remand, the district court found that Alabama law did not give preclusive effect to the state court's determination of the res judicata issue because there was no final judgment in that action and that an injunction was proper under principles of equity, comity and federalism. It therefore ordered that its injunction continue in force. The district court also denied Parsons' motion requesting that the judge recuse himself. These determinations are the subject of the appeal in No. 86-7506.

By an earlier order, the district court had determined that the trustee's UCC claim arose out of pre-sale matters regarding ac-

tions of First Alabama and Orange that should have been raised in the federal action and therefore had declined to modify its injunction to allow the trustee to pursue a UCC claim on behalf of Parsons-Montgomery. That order is the subject of the appeal in No. 85-7343. Also pending before this Court is Appellants' motion to supplement the record on appeal.

II. DISCUSSION

A. Finality of State Court Determination of Res Judicata Issue

The preclusive effect of the federal action was raised in the state court action by Appellees through motions to dismiss, motions for summary judgment and motions for directed verdict, all of which were denied. The district court held that these rulings were not final judgments entitled to preclusive effect under Alabama law. The district court found that the issue was still pending before the state court in connection with Appellees' motions for judgment notwithstanding the verdict or for a new trial at the time the district court issued its injunction. Because the district court concluded that finality for purposes of appeal and for purposes of determining preclusive effect are equated under Alabama law, that court held that the pendency of these post-trial motions prevented the state determination from having a preclusive effect because an appeal could not be taken until resolution of the post-trial motions. We find no error in the district court's determination of this issue.

[1,2] The Full Faith and Credit Act requires that a federal court give preclusive effect to a state court judgment to the same extent as would courts of the state in which the judgment was entered. *Cable Holdings of Battlefield, Inc. v. Cooke,* 764 F.2d 1466, 1473 (11th Cir. 1985). Under Alabama law, res judicata and collateral estoppel principles do not apply until there is a final judgment rendered on the merits of the case. *Food Service Distributors, Inc. v. Barber,* 429 So.2d 1025, 1027 (Ala. 1983); accord, *Owen v. Miller,* 414 So.2d 889, 890-891 (Ala. 1981);

Pooley v. State, 470 So.2d 1337, 1339 (Ala.Crim.App. 1985). Denial of a motion for summary judgment is not a final judgment. *Barber,* 429 So.2d at 1027. Nor does such a denial become the law of the case: "a court may reconsider its ruling on a motion for summary judgment and may correct an erroneous ruling at any time before final judgment." *Id.* Therefore, denial of Appellees' motions for summary judgment was not a final adjudication of the preclusion issue.

There is no Alabama law on the question of whether a jury verdict is considered a final judgment for preclusion purposes when it is rendered nonappealable by the pendency of post-trial motions. It appears, however, that the district court was correct in its determination that Alabama equates finality for purposes of preclusion with appealability.[5] In *Sterling Oil of Oklahoma, Inc. v. Pack,* 291 Ala. 727, 287 So.2d 847 (1973), the Alabama Supreme Court, noting that the test was the finality of the judgment, found that it was required to give preclusive effect to a district court's grant of partial summary judgment on the issue of whether appellant was qualified to do business because the grant of summary judgment, although interlocutory, was appealable. *Id.* at 861. The Court stated:

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[5] This is the federal rule. J. Moore, 1B Moore's Federal Practice para. 0.416[3] at 519-520 (2d ed.1984) (finality for res judicata purposes is "closely related to that for appealability under the final judgment rule of 28 U.S.C. §1291"). Nonappealable interlocutory orders are not entitled to collateral estoppel or res judicata effect. *Id.* at 520. Professor Moore notes that, on analogous reasoning, post-trial motions that destroy the finality of the judgment for purposes of appeal, such as a motion for judgment n.o.v., also should destroy the preclusive effect of the judgment. Id. But see *Hubbell v. United States,* 171 U.S. 203, 210, 18 S.Ct. 828, 831, 43 L.Ed. 136 (1898) (dicta expressing doubt as to whether motion for new trial would prevent preclusive effect). The Restatement (Second) Judgments takes the opposite position: "A judgment otherwise final for purposes of the law of res judicata is not deprived of such finality by the fact that time still permits commencement of proceedings in the trial court to set aside the judgment and grant a new trial or the like; nor does the fact that a party has made such a motion render the judgment nonfinal." Restatement (Second) Judgments §13, Comment f (1980).

> We have been cited to no persuasive authority, and we have found none, on either side of this issue. We believe the appealable nature of such order - given the other prerequisites is the controlling factor; and we, therefore, hold that the principle of comity requires that we give res judicata effect to the judgment of the federal court, applying Alabama substantive law, holding on its merits that the [contract] is not void for failure ... to qualify as a foreign corporation ..., which judgment was neither revoked, amended, nor reversed on appeal. *Id.*

[3] The judgment entered pursuant to the jury verdict in the state action in this case was not final for purposes of appeal during the pendency of the judgment n.o.v. and new trial motions. See A.R.A.P. 4(a)(3); *Spina v. Causey,* 403 So.2d 199, 201 (Ala. 1981). Therefore, the district court did not err in finding that there was no final judgment for preclusion purposes under Alabama law. *Cf. Cable Holdings,* 764 F.2d at 1473 (district court erred in giving res judicata effect to state court judgment not final for purposes of appeal under Georgia law when it appeared that Georgia measured finality for res judicata purposes by same standard as finality for appeal).[6]

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[6] Appellants make several arguments as to why the judgment in the state action should be considered final. We find these arguments unpersuasive. First, Appellants argue that Alabama would consider a judgment in this posture final for other purposes, such as measuring the date from which interest would run. However, whatever may be the criteria for determining the finality of a judgment for other purposes, *Sterling* clearly indicates that appealability is the criterion under Alabama law for determining a judgment's finality for preclusion purposes. Second, Appellants point to statements of the trial judge which they argue indicate that he viewed his decision of the res judicata issue as final in the sense that he did not plan to change his mind, and they take issue with the district court's determination that the trial judge has reserved the res judicata issue for determination in connection with the motion for judgment n.o.v. Whether the trial judge in the state action intended to change his decision with regard to the res judicata issue upon reconsideration of that issue in connection

B. Considerations of Equity, Comity and Federalism

1. Younger Abstention

The Supreme Court stated that "[s]hould the District Court conclude that the state court judgment is not entitled to preclusive effect under Alabama law and the Full Faith and Credit Act, it would then be in the best position to decide the propriety of a federal-court injunction under the general principles of equity, comity, and federalism discussed in *Mitchum v. Foster,* 407 U.S. 225, 243, 92 S.Ct. 2151, 2162, 32 L.Ed.2d 705 (1972)." *Parsons III,* 106 S.Ct. at 773. In *Mitchum,* The Supreme Court held that section 1983 came within the "expressly authorized" exception contained in the Anti-Injunction Act, but noted that "[i]n so concluding, we do not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to en-

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with Appellees' motions for judgment n.o.v. is not determinative of the question of whether the judgment was final for preclusion purposes. As discussed above, the Alabama rule is that a judgment is not final for preclusion purposes until it is appealable. Third, Appellants argue that the res judicata issue could not be raised in connection with a motion for directed verdict or for judgment n.o.v. because the only issue for consideration in connection with these motions is the sufficiency of the evidence to support the jury's verdict. Alabama courts, however, have held a directed verdict or motion for judgment n.o.v. proper on the basis of an issue of law that is appropriatefor decision by the judge rather than the jury. *E.G., Saxon v. Johnson,* 393 So.2d 1007, 1010-11 (Ala.App. 1980), cert. denied sub nom. *Ex parte Johnson,* 393 So.2d 1012 (Ala. 1981) (directed verdict should have been granted on basis of interpretation of deed, which was issue reserved for decision by judge in pretrial order). Finally, Appellants argue that Appellees' federal suit was a collateral attack on a final judgment prohibited under Alabama law. See *Williams v. First National Bank of Mobile,* 384 So.2d 89, 94 (Ala. 1980). This argument, however, assumes the existence of a final judgment in the state court action and, therefore, begs the question. The mere pendency of two suits involving the same subject matter does not create a preclusive bar until final judgment in one of them. *Logan v. O'Barr,* 122 So.2d 376, 380 (Ala. 1960). Further under Alabama law, a suit to enjoin the execution of a judgment is considered a direct, not a collateral, attack on the judgment. *Williams,* 384 So.2d at 93.

join a state court proceeding." 407 U.S. at 243, 92 S.Ct. at 2162. The *Mitchum* Court stated that "[t]hese principles, in the context of state criminal prosecutions, were canvassed at length...in *Younger v. Harris.*" *Mitchum,* 407 U.S. at 243, 92 S.Ct. at 2162 (citation omitted).

[4] The district court interpreted the Supreme Court's mandate in *Parsons III* as requiring that the district court measure the appropriateness of an injunction in this case under the standards established by *Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), for enjoining state criminal prosecutions. Under *Younger,* a federal court should abstain from enjoining an ongoing state criminal proceeding absent a showing of bad faith prosecution or harassment or a showing that the challenged statute is flagrantly and patently violative of express constitution prohibitions. *Younger,* 401 U.S. at 53-54. 91 S.Ct. at 754-55; accord, *Huffman v. Pursue, Ltd.,* 420 U.S. 592, 611, 95 S.Ct. 1200, 1211, 43 L.Ed.2d 482 (1975). Proceedings on the assumption that an injunction of the state court action in this case would be appropriate only if this case came within one of the narrow exceptions to the *Younger* doctrine, the district court found that Appellants had engaged in harassment and bad faith sufficient to justify issuance of an injunction.

We need not reach the issue of whether the district court was correct in its determination that Appellants' actions amounted to bad faith and harassment because we find that the *Younger* doctrine is not applicable on the facts of this case. As discussed above, *Younger v. Harris* dealt with the propriety of a federal injunction against ongoing state criminal proceedings. In the civil context, the comity principles embodied in the *Younger* doctrine have been held applicable when "the State's interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government." *Pennzoil Co. v. Texaco, Inc.,* ___ U.S. ___, ___, 107 S.Ct. 1519, 1526, 95 L.Ed.2d 1 (1987). See, e.g., id. 107 S.Ct. at 1527 (state interest in execution of state judgments); *Ohio Civil Rights Comm'n v. Dayton*

Christian Schools, Inc., ____ U.S. ____, ____, 106 S.Ct. 2718, 2723, 91 L.Ed.2d 512 (1986) (state civil rights commission action to vindicate state interest in elimination of sex discrimination); *Middlesex County Ethics Comm'n v. Garden State Bar Ass'n*, 457 U.S. 423, 434, 102 S.Ct. 2515, 2522, 73 L.Ed.2d 116 (1982) (important state interest in maintaining and assuring the professional conduct of attorneys it licenses); *Moore v. Sims*, 442 U.S. 415, 423, 99 S.Ct. 2371, 2377, 60 L.Ed.2d 994 (1979) (child custody proceedings "in aid of and closely related to criminal statutes"); *Juidice v. Vail*, 430 U.S. 327, 335-36, 97 S.Ct. 1211, 1217, 51 L.Ed.2d 376 (1977) (vital state concern in enforcement of contempt proceedings); *Trainor v. Hernandez*, 431 U.S. 434, 444, 97 S.Ct. 1911, 1918, 52 L.Ed.2d 486 (1977) (suit and accompanying writ of attachment brought by state to vindicate important state policies such as safeguarding the fiscal integrity of public assistance programs); *Huffman*, 420 U.S. at 609, 95 S.Ct. at 1210 (proceeding pursuant to state nuisance statute "in aid of and closely related to criminal statutes"). Thus, it is only civil proceedings "in which important state interests are involved" that warrant abstention under the *Younger* doctrine. *Moore*, 442 U.S. at 423 & n.8, 99 S.Ct. at 2378 & n.8 ("we do not remotely suggest that every pending proceedings between a State and a federal plaintiff justifies abstention unless one of the exceptions to *Younger* applies"); accord, *Cate v. Oldham*, 707 F.2d 1176, 1183 (11th Cir. 1983) ("Application of the *Younger* doctrine to ongoing state civil proceedings has been limited to those civil actions in aid of criminal jurisdiction or involving enforcement-type proceedings in which vital interests of the state qua state are involved.").

[5] Therefore, the initial inquiry in determining whether a federal court should abstain when asked to enjoin an ongoing state civil proceeding is whether an important governmental interest of the state is implicated by that civil action so that such an injunction would be "an offense to the State's interest ... likely to be every bit as great as it would be were this a criminal proceedings." *Juidice*, 430 U.S. at 336, 97 S.Ct. at 1217

(quoting *Huffman,* 420 U.S. at 604, 95 S.Ct. at 1208). Because the district court interpreted the Supreme Court mandate as requiring application of *Younger,* the district court did not make this threshold inquiry as to whether an important state interest was implicated in this case. We do not read the Supreme Court's mandate as dispensing with this threshold inquiry. Instead, the Supreme Court's mandate merely states, as did the opinion in *Mitchum,* that the fact an injunction may be permissible under an exception to the Anti-Injunction Act does not mean that the district court should not also consider whether such an injunction is appropriate under the principles reflected in the *Younger* doctrine.

[6] Our consideration of this threshold inquiry leads us to conclude that *Younger* abstention is not appropriate in this case because the state court action enjoined by the district court does not implicate any important government interest of the State of Alabama. The importance of a state interest may be demonstrated by the fact that the proceedings sought to be enjoined are noncriminal proceedings bearing a close relationship to criminal proceedings or by the fact the proceedings are necessary for the vindication of important state policies or the functioning of the state judicial system. *Middlesex Ethics Comm'n,* 457 U.S. at 432, 102 S.Ct. at 2521. Alabama is not a party to the action enjoined in this case, nor was that action brought to vindicate important interests of that State. Similarly, the action does not implicate the State's "important interests in administering certain aspects of [its] judicial system[]." *Pennzoil,* 107 S.Ct. at 1527. The state court action involved in this case was merely a private action between private parties in which the State of Alabama had no interest beyond "its interest as adjudicator of wholly private disputes." *Id.* at n. 12. Therefore, we find that the *Younger* doctrine did not require that the district court abstain from issuing the injunction against further state court proceedings.

2. Propriety of the Injunction

"[T]he phrase 'to protect or effectuate its judgments' authorize[s] a federal injunction of state proceedings only 'to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case.' " *Parsons III,* 106 S.Ct. at 773 (quoting *Atlantic Coãst Line Railroad Company v. Locomotive Engineers,* 398 U.S. 281, 295, 90 S.Ct. 1739, 1747, 26 L.Ed.2d 234 (1970)). Further, accomodation of the state and federal interests involved when a federal court is asked to enjoin a state court proceeding has led to the requirement that the party seeking the injunction must make a "strong and unequivocal showing of relitigation." *Delta Air Lines, Inc. v. McCoy Restaurants, Inc.,* 708 F.2d 582, 585-86 (11th Cir. 1983). In *Parsons II,* this Court found that Appellees had made the requisite showing in this case. 747 F.2d at 1375. We find no reason to alter that conclusion.

[7] Appellants assert that the district court's injunction was improper in light of the Supreme Court's decision in *Atlantic Coast Line R. Co. v. Locomotive Engineers,* 398 U.S. 281, 90 S.Ct. 1739, 26 L.Ed.2d 234 (1970). We cannot agree. While the Supreme Court noted in *Parsons III* that the present action was "similar to *Atlantic Coast Line,* in which we held that the various exceptions to the Anti-Injunction Act did not permit a federal court to enjoin state proceedings in circumstances more threatening to federal jurisdiction than the circumstances of this case," Id. 106 S.Ct. at 772-73, that statement certainly was not tantamount to a holding by the Supreme Court that the injunction in this case was improper. The Supreme Court clearly did not reach the issue of the propriety of the injunction in *Parsons III.* Further, given our determination that the state court judgment in this case was not final for preclusion purposes, *Atlantic Coast Line* clearly is distinguishable from the present case.

Atlantic Coast Line involved a federal court order enjoining enforcement of a prior state injunction which prohibited

picketing by the *Brotherhood of Locomotive Engineers* ("BLE") at a switching yard known as Moncrief Yard, which was owned and operated by *Atlantic Coast Line Railroad* ("ACL"). ACL originally had sought an injunction in the federal district court, but that court had denied relief. ACL then obtained an injunction in state court. Two years after the state court had issued its injunction, the Supreme Court rendered its decision in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.,* 394 U.S. 369, 89 S.Ct. 1109, 22 L.Ed.2d 344 (1969), which considered the validity of picketing by the BLE and other unions at a location directly next to Moncrief Yard and held that the unions had a federally protected right to picket that could not be interfered with by state court injunctions. BLE filed a motion in state court to dissolve the injunction as improper under *Jacksonville Terminal,* which was denied. Instead of appealing that denial, BLE sought an injunction of enforcement of the state injunction in federal court, and the district court granted the injunction. BLE argued that the district court's injunction was proper under the Anti-Injunction Act either as necessary to protect or effectuate the district court's prior denial of an injunction of the picketing or as necessary in aid of its jurisdiction, another exception to the Anti-Injunction Act. *Atlantic Coast Line,* 398 U.S. at 283-84, 90 S.Ct. at 1741.

BLE's argument that the injunction was proper under the relitigation exception was based on its contention that the district court had determined in its original order denying ACL's request for an injunction that BLE had a federally protected right to picket Moncrief Yard that could not be interfered with by the state courts. Id. at 288, 90 S.Ct. at 1744. The Supreme Court rejected that interpretation of the district court's original judgment, concluding instead that what BLE sought to protect by the federal court injunction was not the district court's original judgment but the "amplification" of that judgment provided by the intervening decision in *Jacksonville Terminal. Id.* at 293, 90 S.Ct. at 1746. The Court stated

that "[s]uch a modification of an earlier order through an opinion in another case is not a 'judgment' that can properly be protected by an injunction against state court proceedings." *Id.* The Court found that the union was in effect seeking federal appellate review of the state court determination that *Jacksonville Terminal* did not require that the state court injunction be dissolved. *Id.*

Atlantic Coast Line is distinguishable from the present case in at least two respects. First, the issue of res judicata barred relitigation of issues that could have been raised in the original federal action was not presented in *Atlantic Coast Line.* The union in *Atlantic Coast Line* did not argue that the federal injunction was proper because the issue of whether the federal right to picket precluded state court injunctions could have been raised in the prior federal proceeding. Instead, CLE argued that question had in fact been decided in the prior proceedings, and the Supreme Court rejected that contention on the record before it. In the present case, however, this Court affirmed the district court's finding that the issues raised in the state court proceeding should have been raised as pendent claims in the BHCA action and therefore were barred under res judicata principles. *Parsons II,* 747 F.2d at 1374, 1379. Precedent binding on this Circuit clearly holds that "a federal court may enjoin a state court proceedings which is precluded under the doctrine of res judicata." *Woods Exploration & Producing Company v. Aluminum Co. of America,* 438 F.2d 1286, 1312 (5th Cir. 1971), cert. denied, 404 U.S. 1047, 92 S.Ct. 701, 30

L.Ed.2d 736 (1972). We find nothing inconsistent between that precedent and the Supreme Court decision in *Atlantic Coast Line.*[7]

Second, unlike the situation in *Atlantic Coast Line,* the present case does not involve an improper attempt to seek federal appellate review of a state court decision. As discussed above, the state court determination that the failure to raise the state claims in the BHCA action did not operate as a bar to raising the claims in the state action was not final at the time the district court issued its injunction in this case. Thus, although Appellees waited until a late point in the state court exception, but rather that the injunction at issue in *Atlantic Coast Line* was not proper as necessary in aid of the district proceeding to seek an injunction, they did so before the state court had made a final

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[7] In support of their position, Appellants point to language in *Atlantic Coast Line* where the Court stated that "[w]hile the railroad could probably have based its federal case on the pendant state law claims as well, it was free to refrain from doing so and leave the state law questions...to the state courts" because "the state and federal courts had concurrent jurisdiction in this case, and neither court was free to prevent either party from simultaneously pursuing claims in both courts." 398 U.S. at 295, 90 S.Ct. at 1747 (citations omitted). This language, however, appears in the Supreme Court's discussion of whether the injunction was proper as necessary in aid of the district court's jurisdiction and not in its discussion of the propriety of the injunction under the relitigation exception. In that context, it is clear that the Supreme Court did not intend to suggest by this language that the res judicata effect of a prior federal judgment could not justify an injunction under the relitigation court's jurisdiction because under the concept of concurrent jurisdiction, both the federal and state court had jurisdiction to proceed simultaneously.

determination with regard to the preclusion issue.[8] In *Atlantic Coast Line,* however, the state court's denial of BLE's motion to dissolve was final, and BLE chose to seek an injunction in federal court rather than appealing that decision, thereby, in effect, attempting to obtain improper appellate review of the state court decision by the federal court.

[8] We also find without merit Appellants' argument that the injunction was improper because *Parsons I* Court upheld the district court's grant of judgment n.o.v. on a different rationale from that given by the district court. While, as Appellants argue, the preclusive effect of a judgment is determined by the decision of the appellate court when that decision rest on different grounds from the district court's decision, see J. Moore, 1B Moore's Federal Practice para. 0.416[2], at 518-19 (2d ed. 1984), that principle does not alter the res judicata effect of the BHCA action in this case. Even assuming this Court's decision in *Parsons I* rested on different grounds from that of the district court, it is clear that both this Court's decision and the district court's decision were on the merits and, therefore, the fact they

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[8] We note that in *Parsons II* this Court upheld the district court's finding that Appellees' failure to seek a federal injunction at an earlier point in the state proceeding did not operate as a waiver of their right to do so because the vagueness of the state court pleadings made it difficult to determine that the state action involved the same basic cause of action that was tried in the BHCA action. 747 F.2d at 1376. While the Supreme Court in *Parsons III* distinguished the present case from the case of *Toucey v. New York Life Ins. Co.,* 314 U.S. 118, 62 S.Ct. 139, 86 L.Ed. 100 (1941), on the basis that "[i]n each of the several cases involved in *Toucey,* the prevailing party in the federal action sought an injunction against relitigation in state court as soon as the opposing party commenced the state action, and before there was any resolution of the res judicata issue by the state court" while in this case Appellees "chose to fight out the res judicata issue in state court first, and only after losing there did they return to federal court for another try," *Parsons III,* 106 S.Ct. at 772, the Supreme Court did not question this Court's affirmance of the district court's finding that the Appellees were excused for failing to seek an injunction at an earlier point in the state proceedings, and we find no reason to alter that determination.

may have been based on different grounds does not alter the determination as to Appellants' state law claims.

Finally, we find without merit the trustee's various arguments challenging the decision of the *Parsons II* Court upholding the district court's finding that the trustee was bound by the BHCA action under res judicata principles because he was in privity with the parties to that action. Parsons II, 747 F.2d at 1379. Those arguments were adequately dealt with by the panel in *Parsons II*, and we find no reason to reconsider that Court's determination with regard to the privity issue.[9] The trustee points out that this Court's prior opinion erroneously stated in affirming the district court's finding of privity that the federal action was pending at the time of the bankruptcy, when in fact Parsons-Montgomery was placed in bankruptcy before the federal action was filed. See id. at 1370, 1379. The timing of the bankruptcy in relation to the filing of the federal action, however, was not critical to the *Parsons II* Court's determination that the district court did not err in its finding of privity. Rather, that Court's affirmance was based on the trustee's knowledge of the federal action, with regard to which he made a deliberate choice not to intervene; the identity of the facts underlying the BHCA claim and the trustee's claims; and the fact Parsons-Montgomery was the entity primarily wronged by the alleged activities of First Alabama and thus would have been the party entitled to most of the damages. *Id.* at 1379.

[9] A district court had discretion to determine whether federal interference with state proceedings is warranted pursuant to the relitigation exception to the Anti-Injunction Act and, within that discretion, a district court in a given case may go either way and not be reversed. *Delta Air Lines*, 708 F.2d at 587. We cannot say that issuance of this injunction exceeded the bounds of the district court's discretion.

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[9] We note that this issue was presented for review to the Supreme Court, but that Court found it unnecessary to reach the issue. *Parsons III*, 106 S.Ct. at 773 n.4.

C. Motion to Recuse

Parsons argues that the district judge should have recused himself because he has a personal bias against Parsons based on extrajudicial information. Parsons presented his request for recusal in the form of a letter, which the district judge construed as a motion to recuse. The information of which Parsons complains is evidenced by two statements in the district court's opinion, one showing the district judge's knowledge that Parsons had brought suit against his former attorneys, who represented him in this litigation through the time of the Supreme Court decision in *Parsons III,* and the other being a statement to the effect that "Mr. Parsons had secured a recusal by a State Court Judge by writing a similar letter to him.

The district court held that recusal was not appropriate because "the Court's only association with Mr. Parsons and any opinion that it may have of him has been gained in open Court." The district court also noted that Parsons had refused to appear at the hearing held on the motion as requested by the district court and that "the matter was presented with no evidence and no insistence upon the motion by anyone whatsoever, including Mr. Parsons' attorney." The district court also indicated that it had been "hasty and overcautious in construing the letter as a motion."

[10,11] Bias sufficient to disqualify a judge must "stem from personal, extrajudicial sources" unless "pervasive bias and prejudice is shown by otherwise judicial conduct." *United States v. Gregory,* 656 F.2d 1132, 1137 (5th Cir. Unit B 1981). Parsons has failed to present evidence sufficient to demonstrate bias in this case.

D. Motion to Supplement the Record

Appellants have moved to supplement the record with 122 pages of material from the official court record in the state action. Appellants assert that these documents are necessary for

this Court to have an accurate knowledge of what transpired in the state court proceeding.

[12,13] This Court has the discretionary power to supplement the record on appeal, even to include evidence not reviewed by the court below. *Dickerson v. Alabama,* 667 F.2d 1364, 1367 (11th Cir.), cert. denied, 459 U.S. 878, 103 S.Ct. 173, 74 L.Ed.2d 142 (1982). We find no need, however, to exercise that discretion in this case. The thrust of the supplemental material is that the state judge has considered the res judicata issue on the merits and determined it adversely to Appellees. That fact is already clear from the record before us. As discussed above, the issue is not whether there had been a determination on the merits in state court, but whether that determination was final for preclusion purposes. Therefore, there is no need to supplement the record on this point. Further, although Appellants suggest that the district court may have referred to documents not in the record in reaching its decision, they have been unable to point to any specific documents not already in the record that were relied upon by the district court. The motion to supplement record is denied.

E. Findings Regarding Basis of UCC Claim

In *Parsons II,* this Court held that the factual record was insufficient to determine whether the trustee should be precluded from asserting his UCC claim. 747 F.2d at 1380. The Court found that if the trustee's claim was based "on factual allegations different from those underlying the fraud and BHCA claims" then he should not be precluded by the former federal judgment. *Id.* Therefore, the Court remanded for a determination whether the claim was based "on facts involving solely the conditions of the sale itself" rather than on allegations that the pre-sale activities of First Alabama and Orange had resulted in the receipt of an unfairly low price. *Id.* at 1381. On remand, the district court ordered the trustee to state his claim with specificity and then determined that the UCC claim was based on the pre-sale transactions also involved in the BHCA action.

[14] The trustee argues that the district court's determination that the trustee's UCC claim arose out of the same transactions as those forming the basis of the BHCA claim was clearly erroneous. We cannot agree. In response to the district court's order requiring that the UCC claim be stated with specificity the trustee gave the following basis for the claim: (1) the sale was a private sale two days after repossession; (2) only one potential buyer was notified of the sale; (3) the buyer (Orange) had no experience in the steel business and no prior knowledge of the value of the assets; (4) no one in the steel business and no unsecured creditor was contacted as to the date and time of the sale; (5) no notice was given to the attorney for Parsons-Montgomery prior to the sale; (6) no notice was placed in any trade or other publications; (7) no one except the seller, purchaser and the purchaser's attorney was present; (8) the sale took place in Herbert's office, rather than a public place; (9) the price was determined in accordance with the amount of the debt; (10) only one bid was offered and accepted; and (11) the sale price was $907,252.85 while the collateral had a value in excess of $2,500,000. The district court did not err in finding that all of these facts related to the pre-sale actions of Appellees.[10]

For the reasons stated above, the judgments of the district court are AFFIRMED.

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[10] The trustee also asserts that the district court based its judgment on collateral estoppel rather than res judicata and that, therefore, its determination is clearly erroneous because the UCC issue was not litigated in the federal action. It is clear, however, that the district court determined that the UCC claim was barred under res judicata principles.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CIVIL ACTION NO. 83V-181-N

FIRST ALABAMA BANK OF MONTGOMERY,
N.A.; ET AL,
Plaintiffs,

VS.

PARSONS STEEL, INC.; ET AL,
Defendants.

OPINION

History of the Case

This cause is submitted on remand by the Court of Appeals, *Parsons Steel v. First Alabama Bank,* 747 F.2d 167, to this Court in conformance with the Opinion of the Supreme Court, *Parsons Steel v. First Alabama Bank,* 88 L.Ed.2d 877, directing this Court on remand to determine and apply Alabama preclusion law and, in the event that this Court should conclude that the State Court judgment theretofore entered is not entitled to preclusive effect under Alabama law and the Full Faith and Credit Act, to decide the propriety of a federal court injunction under the general principles of equity, comity and federalism discussed in *Mitchem v. Foster,* 407 U.S. 225, 243, 32 L.Ed.2d 705, 92 S.Ct. 2151.

In order to accomplish this, this Court must consider the rather lengthy history of this case, as well as its related predecessors in the State and federal courts in Alabama and in the United States Court of Appeals for the Eleventh Circuit and the Supreme Court. On January 17, 1979, the Parsons[1] filed a suit in the Circuit Court of Montgomery County, Alabama. Later in the same year, the Parsons filed another suit in this

Court against substantially the same Defendants.[2] The State Court case lay dormant until late 1982, over a year after this Court's final judgment for the Bank, and in 1983 resulted in verdicts and judgments for the Parsons totaling four million dollars. This proceeding involves the effect of the judgments, each to the other, in these two suits, which this Court has concluded involved substantially the same issues and parties. This remand is to consider the preclusive effect of the determination by the State Court on motion for summary judgment and motion to dismiss that the final judgment of this Court entered on June 17, 1981, was not a res judicata preclusion of the State Court proceeding several years after this Court's judgment in June, 1981.

The State Court Judge recognized in a Bench note a few days before trial that the issue of res judicata involved a question of law to be decided by the Court after denial of the Bank's motions to dismiss and for summary judgment based on the theory of res judicata preclusion, but he did not thereafter mention the res judicata issue. He issued judgment on the jury verdicts for the Parsons totaling four million dollars and was appointed to the State Court of Criminal Appeals before consideration of the final res judicata issue on the Bank's motions for judgment notwithstanding the verdict. Various pretrial motions for dismissal

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[1] The Defendants herein [hereinafter referred to as the Parsons] include Mr. and Mrs. Jim D. Parsons, a bankrupt family-owned steel corporation in Montgomery, its Trustee in Bankruptcy and a Parsons' family-owned steel corporation in Mobile. For purposes of this suit, interests of these Defendants are the same.

[2] Defendants were the Plaintiffs herein, being the Bank, now the First Alabama Bank of Montgomery, its Vice President Ed Herbert, and others with whom we are not concerned in this case, all being hereinafter referred to as the Bank. This Court entered judgment therein for the Defendants [unpublished opinion, USDC M.D. Ala. #79-249-N], affm'd. *Parsons v. First Alabama Bank,* 679 F.2d 242, cert.den. 106 S.Ct. 768.

and for summary judgment had been filed by the Bank on the basis that the federal court had already decided the issues in the State Court case (and those issues which should and could have been presented in the federal court) between the parties and their privies. Without opinion and without indicating why said motions were denied, the State Court denied all of such motions and proceeded to trial in the case. As noted above, the State Court Judge's Bench note of January 27, 1983, cited in Trustee's brief of April 23, 1986, in this Court, shows that the State Judge, in denying a motion in limine, indicated his "general impression that the issue of res judicata is an issue properly to be decided by the Court rather than an issue to be presented to and decided by the jury." This indicated both that the issue was to be treated as one of law and that it was "*** to be decided ***", not that it had been decided. This entry was made a few days before trial began.

Thereafter, the Court denied all directed verdict motions properly made without discussing res judicata issues and entered judgment on the verdict on February 9, 1983. Apparently, he felt the issue could best be reserved for post-trial motion.[3] The Bank timely filed its motion for judgment notwithstanding the verdict and for new trial, including a claim of the preclusive effect of the prior federal judgment. Those motions were still pending in State Court, as they now are, when subject injunction was entered in this Court.

Encouraged by the fact that the State Court never gave any reason for denying the various motions based on the res judicata preclusive effect of the federal judgment, the fact that the State Judge entered in a bench note dated a few days before the trial that the res judicata issue was a question of law to be decided

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[3] Rule 50, Alabama Rules of Civil Procedure, approves the practice of taking a verdict in questionable cases, but reserving mature and final consideration of questionable legal matters to be determined on motion for new trial or for judgment notwithstanding the verdict.

later by the Court and by the fact that the res judicata issue was never mentioned in the final judgment in the case, the Bank's attorney filed a motion for judgment notwithstanding the verdict and, in the alternative, for new trial in the State Court. These motions are pending today. Discouraged, however, by the fact that the State Court Judge did not enter any order or judgment based on the theory of res judicata in which he expressed any reasons for his order and by the fact that the State Court Judge entered a judgment on the verdict and ascended to the State Court of Appeals without mentioning the issue, the Bank's attorneys filed the instant proceeding, *First Alabama Bank, et al v. Parsons Steel, et al,* in which they sought, pursuant to the relitigation exception to the Anti-Injunction Act [28 U.S.D. § 2283] to restrain implementation and enforcement of the State Court's judgment, totaling four million dollars and effectively nullifying a judgment notwithstanding the verdict for the Bank in this Court which had then been affirmed by the United States Court of Appeals and upon which certiorari was later denied by the Supreme Court of the United States. Perhaps he returned to this Court in order to avoid the necessity of acquainting yet another court with the pleadings and evidence in both cases.

This Court, being of the opinion that this Court decided substantially the same issues between *substantially the same* parties, at least a year before the four million dollar judgment in the Circuit Court of Montgomery County, Alabama [hereinafter sometimes referred to as the State Court or State Trial Court] and being of the opinion that it had a duty to protect the parties from relitigation of issues litigated in this Court, entered an injunction on March 29. 1985, against the Parsons' and their privies' attempting to implement or enforce the judgment of the State Court [*First Alabama Bank, et al v. Parsons Steel, et al,* unpublished Opinion #83-V-181-N].

The Parsons, being *encouraged* by their State Court verdict for four million dollars, appealed this Court's injunction of March 29, 1985, to the United States Court of Appeals for the

Eleventh Circuit, which by its Order in *Parsons Steel v. First Alabama Bank,* 747 F.2d 1367, affirmed in part but remanded the case to this Court to determine whether or not the claim of the Trustee in Bankruptcy of the Montgomery Parsons Corporation involved anything that happened during or after the sale which might be considered on the Parsons' claims for violation of the Uniform Commercial Code [UCC]. By Order of March 29, 1985, and being uninformed that the Parsons had petitioned for certiorari, this Court entered its opinion that all of the complaints of the Trustee in Bankruptcy involved matters planned before the date of the sale and were matters that were already complained of or could and should have been complained of in the original Parsons Steel case.

On certiorari, the Supreme Court was of the opinion that, under the law of Alabama, the decision of the State Court on res judicata issue may have effected a res judicata (full faith and credit) preclusion of further litigation thereon and that, if so, this Court would have been barred from entering any injunction against enforcement of the State Court judgment. The Supreme Court, therefore, remanded the case for this Court to determine that question and, if that question were determined adversely to the State Court's judgment's being conclusive of the issue, this Court was to determine whether under the principles of comity, federalism and equity this Court should properly have enjoined the enforcement of the State Court judgment. *First Alabama Bank v. Parsons Steel,* cert. granted 105 S.Ct. 3497, 87 L.Ed.2d 629, rev'd. & remanded 88 L.Ed.2d 877. See Order of Remand to this Court 785 F.2d 929.

Recusal - Certification

After this remand, this Court received a letter from Mr. James Parsons which indicated to this Court that Mr. Parsons felt that this Court was biased against him and that this Court should not hear any further aspects of the case. Thereupon, this Court sent a copy of the letter to all of the attorneys involved and had it filed construing it as a motion to recuse and asked

contributions from all attorneys on the subject. Additionally, this Court, not being sure of the intent of Mr. Parsons in the matter, asked that Mr. Parsons be in attendance at the hearing to be sure that the Court understood his position about the matter and about who was to represent him, he having brought suit against the lawyers who represented him in obtaining the multi-million dollar verdict and theretofore in this Court. Mr. Parsons notified his attorney that he would refuse to be in Court at the time and place in question, stating that he had a reluctance to appear in a Court presided over by this writer and the matter was presented with no evidence and no insistence upon the motion by anyone whatsoever, including Mr. Parsons' attorney. This Court's only association with Mr. Parsons and any opinion that it may have of him has been gained in open Court presided over by this writer, and this Court, being in the position of every judge who sits on any case wherein any person appears as a witness or otherwise, has formed some opinions of Mr. Parsons. Those opinions and the fact that this Court has ruled against that person in the past do not place this Court in a position of recusing himself from further proceedings in the same case. If they do, it is doubtful that any judge could ever complete a complicated case as each individual being in contact with another must necessarily form some opinion of that other person. Federal law indicated that bias is an attitude of extra-judicial origin. *Barkin v. United States,* 362 F.2d 158, cert.den. 385 U.S. 882; *Ferrari v. United States,* 169 F.2d 353. The federal courts have apparently consistently held that bias is not sufficient to be a cause of recusal if it arises out of judicial experience rather than from personal experience with the party. *Knapp v. Kinsey,* 232 F.2d 458, reh.den. 235 F.2d 129, cert.den. 352 U.S. 892. A judge should not disqualify himself because of a litigant's threat to sue the judge or because of a litigant's surly remarks. *In re Martin-Trigona,* 573 F.Supp. 1237 (Conn. 1983). To require recusal, the alleged bias of the judge must be both personal (directed against a party) and extra-judicial. *United States v. Kelley,* 712 F.2d 884 (1982). Although Mr. Parsons had secured a recusal by a State Court

Judge by writing a similar letter to him, in consideration of the facts and the law hereinabove set out, this Court was of the opinion that the attorney for Mr. Parsons and, perhaps, even Mr. Parsons himself had little interest in having this Court recuse himself. Irrespective of interest, this Court is of the opinion that a judge should not recuse himself because of an opinion of a party in a lawsuit formed during the litigation. This writer has had no contact with Mr. Parsons other than in the litigation involved in these matters. It is the opinion of this Court that this Court was hasty and overcautious in construing the letter as a motion and that it should not recuse itself. It is, therefore, the opinion of this Court that the motion for recusal should be denied.

In further reference to the motion to recuse, this Court suggested to the attorneys at the hearing and before the hearing that perhaps this Court should certify the legal questions on Alabama law to the Supreme Court of Alabama for its consideration thereof. The initial reaction of all of the attorneys, including Mr. Parsons' private attorney, was that this litigation had already reached extreme proportions, that to submit the matter to a new Court unfamiliar with either of the earlier proceedings would not be a wise solution to anything and would only probably prolong litigation. This Court was of the opinion that all attorneys were agreed that this Court should decide the matter. Thereafter, the Hon. Jerry Wood, attorney for the Trustee in Bankruptcy, had some second thoughts about the matter, but the majority of the attorneys present consistently appeared to feel that the matter should not be referred to any other Court. This Court is of the opinion that, as the matter has been exhaustively presented already to all of the federal courts and no State Judge is available who has knowledge of the case, the parties will best proceed in this Court and that any possible error of this Court may be more easily corrected than if the parties re-present all of the litigation to a new series of courts.

Res Judicata - Full Faith and Credit

This Court's first inquiry is not limited to the question under Alabama law and the Full Faith and Credit Act of the preclusive effect of the Alabama State Court's denial of the Bank's motion for summary judgment.[4] Thereafter, if this Court determines that Alabama law limits res judicata effect to final judgments, then this Court must determine whether doctrines of equity, comity and federalism require this court to yield its previously exercised jurisdiction to a State Court's obliteration of a federal judgment after its successful progress throughout federal review. This Court, in granting the injunction in this case, has fully compared the issues and evidence in the State and federal trial courts and will not again belabor that question, nor shall this Court again belabor the determination that the pleadings and factual issues were so vague in both trial courts that it was not clear until after final argument in the State Court that essentially the same cause of action was involved in both cases and that the prior federal judgment was in serious danger of being nullified. Indeed, this Court found it necessary to require Trustee's attorney to specifically state his State Court claims so as to satisfy the Court of Appeals that the same issues were available in both cases.

There can be no doubt that federalism, comity and the Full Faith and Credit Act provide that a federal court must give the same preclusive effect to a State Court judgment as another court of that State would give. *Parsons Steel v. First Alabama Bank,* 88 L.Ed.2d 877. As the Supreme Court in this case pointed out, "Once the state court has finally rejected a claim of res judicata, then the Full Faith and Credit Act becomes applicable," and the federal court is helpless to intercede even [in the words of 28 U.S.C. § 2282] "*** where necessary to protect

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[4] That question is tempered by the Alabama judgment on the verdict without a final res judicata ruling when the State Judge recognized the issue as one of law.

or effectuate its judgment." This Court construes the *Parsons* Supreme Court to hold that, even though a federal court has entered a prior final judgment, even if difficulty arises in proving that a State Court's concurrent jurisdiction involves the same cause of action between the same parties until after all evidence is presented in State Court, the federal court has no right to enter an injunction to protect or effectuate its prior judgment if the applicable State law recognizes the State judgment as a res judicata preclusion. The Supreme Court makes plain that, in spite of the wording and apparent congressional intent of the Anti-Injunction Act, challenges to the correctness of a State Court's determination as to the conclusive effect of a prior federal judgment (if conclusive under the law of the subject State) must be pursued by way of appeal through the State Court system and certiorari from the Supreme Court. If, on the other hand, that State Court's judgment is not conclusive, then the provisions of the Anti-Injunction Act's relitigation exception is still limited by the *Younger* doctrine (equity, federalism and comity) expressed in *Michem v. Foster,* supra. So limited to these confines but concerned about the resulting disregard for federal court authority, this Court must approach this case through the narrow remains of the relitigation exception.

It is difficult to understand how this court could more clearly be called upon to protect or effectuate its judgment than to have a State Court effectively hold its prior Defendants' judgment for naught and grant a four million dollar Plaintiffs' judgment for the same circumstances. The State Court, giving no reason and articulating no set of circumstances, denied all motions based on the ground that this Court's prior judgment precluded further State Court litigation of the same circumstances between the same parties and their privies. It considered this defense, however, only on motion to dismiss and motion for summary judgment. It never considered the res judicata defense on the merits of the case after hearing the evidence. The res judicata defense, involving a question of law, was properly not submitted to the jury and properly remains to be decided on the Bank's

motion for judgment notwithstanding the verdict or for a new trial. The record does not show that the State Court has ever ruled on the res judicata issue based upon a comparison of the pleadings, the evidence and the issues in both cases. Its rulings on the preliminary motions were not final judgments. This Court is the first court to rule on the res judicata issue based upon the merits and in a final judgment. Elements of a res judicata defense are set out by the Supreme Court of Alabama in *Braggs v. Jim Skinner Ford,* 432 So.2d 466, 468 (Ala. 1983), as follows: "(1) prior judgment rendered by court of competent jurisdiction; (2) prior judgment rendered on the merits; (3) parties to both suits substantially identical; and (4) same cause of action present in both suits."

In *Lane v. Central Bank of Alabama,* 756 F.2d 814 (11th Cir. 1985), the Court of Appeals, construing Alabama law, concluded that, since State Courts have concurrent jurisdiction with federal courts to hear claims arising under the Bank Holding Company Act, plaintiff's claim under the Bank Holding Company Act in a subsequent federal proceeding was barred by the doctrine of res judicata because plaintiff failed to assert it in his prior State Court action involving the same facts relied upon by plaintiff in the federal court.

This Court has found no Alabama law directly in point, and has been cited none, as to the preclusive effect of a denial of a res judicata defense by denial of motions to dismiss or for summary judgment after the case has progressed to judgment on a verdict and motions for judgment notwithstanding the verdict and for new trial. It is clear, however, that pendency of a case in one court with concurrent jurisdiction does not effect a res judicata bar to an identical suit in another court with jurisdiction. *Logan v. O'Barr,* 122 So.2d 376, 271 Ala. 94. It has long been held that interlocutory decrees generally are not final and, therefore, cannot be pleaded as res judicata in bar to another action. *McLane v. Spence,* 11 Ala. 172.

In *Sterling Oil of Oklahoma, Inc. v. Pack,* 287 So. 847, at 861, the Supreme Court of Alabama, being of the opinion that in the particular circumstances a federal summary judgment was appealable, stated the following: "We believe the *appealable nature* of such order—given the other prerequisites—*is* the *controlling* factor; and we, therefore, hold that the principle of comity requires that we give res judicata effect to the judgment of the federal court, *applying Alabama substantive law,* ***" [emphasis added]. In short, it appears that the Alabama Supreme Court holds that, where judgment in the first proceeding is not appealable, that judgment is not entitled to full faith and credit in another State Court.

Alabama law of res judicata preclusion of an appeal from a prior judgment of a second judgment finalized by nonappeal pending appeal is expressed in an earlier case, *Watson v. Mobile & Ohio Railway Co.,* 173 So. 43, 233 Ala. 690.[5] There plaintiff took appeal from an adverse State Court final judgment and, pending appeal, pursued the same matter to a final federal court judgment, again for the defendant. Thereafter, without appealing from the federal judgment, the plaintiff sought to pursue the appeal in the State Court to which the defendant, appellee, contended that the federal court action, not being timely appealed, was an estoppel by res judicata of the appeal in the State

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[5] Dicta in *Watson v. Mobile & Ohio Railway Co.,* 17 So. 43, 45 (Ala. 1937), shows the attitude of the Supreme Court of Alabama as to the finality of the State Court judgment on the verdict in light of the pending motion for judgment notwithstanding the verdict. That Court pointed out that, assuming federal court jurisdiction, "The judgment could not be attacked collaterally. Proof dehors the record to show the invalidity of the judgment is not permitted on collateral attack. 15 R.C.H. § 373, p. 892." That Court pointed out that, assuming a final federal judgment, the losing party in that judgment "*** could only redress *** by direct application to the court which rendered the judgment, or by bill in equity;" [at 45] and "that a judgment rendered by a federal court in this State is *** a" domestic judgment and should be accorded the same verity as one rendered by the courts of general jurisdiction of this State."

Court. Interestingly, in that case, no res judicata issue was raised by the defendant in the federal court action though final judgment on the matter had theretofore been entered in the State Court action and an appeal lodged therefrom. The Alabama State Supreme Court determined that the judgment of the federal court, not having been appealed timely, could not be attacked collaterally and that the judgment rendered by the federal court in the State of Alabama must be regarded as a "domestic judgment" and should be accorded the same verity as one rendered by the courts of general jurisdiction of this State. BLACK ON JUDGMENTS, § 285; *Pierce v. Winter Iron Works,* 32 Ala. 68; *Riverdale Cotton Mills v. Alabama & Georgia Manufacturing Co.,* 198 U.S. 188, 25 S.Ct. 629, 49 L.Ed. 1008; 15 Ruling Case Law 364. p. 886. The Supreme Court of Alabama thereupon dismissed the appeal of the State Court case, leaving judgments for the defendant in both State and federal courts.

Here, the first final judgment was in federal court. The first judgment was pleaded as a basis for res judicata in the State Court at every opportunity. Applicability of res judicata was preliminarily denied by the State Court which, except for the res judicata issue, proceeded to judgment on the merits. From this State Court judgment, Defendants filed a motion for rehearing or for judgment notwithstanding the verdict which is still pending in the State Court.

It has long been the law where a prior judgment goes both to defects of form and also to the merits, a judgment which does not designate as between the two will be presumed to rest on the former. But if the judgment on demurrer is on the merits, it becomes "res judicata," *Bissell v. Spring Valley,* 124 U.S. 225, 232, 8 S.Ct. 495, 31 L.Ed. 411. Herein, the State Court's rulings on res judicata would be presumed to rest upon form rather than on the merits.

The State Court decided, not that the prior federal judgment did not preclude on res judicata principles a State Court's deter-

mination of the issues, but that (on motions to dismiss and for summary judgment) the pleadings and evidence then before the court were inconclusive. The Court found, neither that the Parsons were entitled to recover, nor that there was no material issue of fact, but simply that the Bank was not entitled to dismissal or summary judgment as a matter of law at that stage of the proceedings. There was no further ruling on the question of res judicata preclusion. The res judicata question, being a question of law, was preserved for the ruling on motion for judgment notwithstanding the verdict.

If in *Watson* the unappealed federal judgment, obtained pending the appeal of the prior State Court judgment, effected a res judicata bar to the appeal of the State Court's judgment, it would appear that the instant federal court judgment, processed throughout the federal courts and terminated before the motions were determined in the State Court, would bar further proceedings in the State Court under Alabama law.

But that is not the question here. The question here is whether the State Court's rulings on res judicata are entitled to full faith and credit.

There is no final judgment in the State action and, thus, no judgment with preclusive effect. Only final judgments have preclusive effect in Alabama, and Alabama law is also clear that finality for preclusion is measured by the same standard as finality for appeal. In *Sterling Oil of Oklahoma v. Pack,* 291 Ala. 727, 744, 287 So.2d 847 (1974), the Court held:

> "The legal test, of course, is the finality *vel non* of such judgment ***.
>
> "*** We believe the appealable nature of such order—given the other prerequisites—is the controlling factor ***."

Sterling Oil was recently cited with approval for the Alabama rule that, "[w]here there has been no prior final judgment, the

doctrine of res judicata cannot apply." *Chandler v. Commercial Union Ins. Co.*, 467 So.2d 244, 251 (Ala. 1985).[6]

CODE OF ALABAMA [1975], § 12-22-2, specifically provides that appeals as of right lie only from final judgments:

> "From any final judgment of the circuit court *** an appeal lies to the appropriate appellate court as a matter of right by either party *** within the time and in the manner prescribed by the Alabama Rules of Appellate Procedure."

Indeed, under Alabama practice, the appellate court must dismiss appeals from nonfinal judgments, *ex mero motu. Foster v. Greer & Sons*, 446 So.2d 605, 609 (Ala. 1984); *Martin v. Hinson*, 364 So.2d 674 (Ala. 1978); *Powell v. Rep. Nat'l. Life Ins. Co.*, 293 Ala. 101, 102, 300 So.2d 359 (1974).

Plainly, the State Court orders denying summary judgment are neither final nor preclusive. Such orders are merely interlocutory and are not entitled to preclusive effect. Moreover, the February 9, 1983, judgment on the jury verdict lost its finality by virtue of the timely filed and pending post-trial motions under Rules 50 and 59, Alabama Rules of Civil Procedure. An appeal filed during the pendency of these motions would have been premature and would have been dismissed. Rule 4(a)(3), Alabama Rules of Appellate Procedure; Rule 59.1, Alabama Rules of Civil Procedure, see, e.g., *Super Value Stores v. Peterson*, No. 85-484 & -523 (Ala. S.Ct. March 6, 1986). Federal authorities accord. *Leishman v. Asso. Wholesale Elec. Co.*, 318 U.S. 203, 87 L.Ed. 714 (1943); *Williams v. Bolger*, 633 F.2d 419 (5th Cir. 1980); *Turner v. HMH Publishing Co.*, 328 F.2d 136

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[6] Accord, *Food Service Distributors v. Barber*, 429 So.2d 1025, 1027 (Ala. 1983); *Quinnelly v. City of Pritchard*, 292 Ala. 178, 182, 192 So.2d 295, 298 (1974); *Ashurst v. Preferred Life Assur. Soc. of Montgomery*, 282 Ala. 119, 126, 209 So.2d 403, 408 (1968).

(5th Cir. 1964); *Healy v. Pennsylvania R. Co.*, 181 F.2d 934 (3rd Cir. 1950).[7]

Accordingly, there are no Alabama judgments in this case which are final and, thus, none which are entitled to preclusive effect under Alabama law. The summary judgment orders are interlocutory. The timely filed post-trial motions rendered the judgment on the jury verdict nonappealable and, thus, non-preclusive. The Alabama Supreme Court in *Food Services Distributors v. Barber*, 429 So.2d 1025, at 1027, held that there is no res judicata effect where the procedural status of the case is such that the trial court may reconsider its ruling on a motion for summary judgment and may correct an erroneous ruling at any time before final judgment. This is apparently the reason that the Alabama courts agree that a denial of a motion for summary judgment is generally not a res judicata bar to trial of the same issues in another case.

At the time this Court issued its injunction (and at present), the post-trial motions were pending before the State Court. Under Alabama law, no appeal could properly be taken while these post-trial motions are pending and unresolved. Since the State Court judgment was not appealable at the time this Court's injunction was issued, that injunction was unfettered by any Alabama judgment entitled to preclusive effect as a final judgment under Alabama law. The reason for this rule is clear. Until judgments are final, they are subject to revision by the trial court at any time.

Appellate courts, including those of this circuit,[8] have repeatedly held that it is "usually desirable" for trial courts to

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[7] Alabama has held that federal decisions guide construction of Alabama rules. *Ross v. Luton*, 456 So.2d 249, 257 (Ala. 1984); *Scott v. Lane*, 414 So.2d 939, 941 (Ala. 1982); *Powell v. Republic Nat'l. Life Ins. Co.*, 293 Ala. 101, 103, 300 So.2d 359 (1974).

[8] See, e.g., *Green v. Reynolds*, 328 F.2d 372 (5th Cir. 1964).

take a verdict, and then pass on the sufficiency of the evidence and other dispositive legal matters on a post-verdict motion. 9 Wright & Miller, FEDERAL PRACTICE & PROCEDURE, § 2533. Alabama practice, as shown in the committee comments to Rule 50, Alabama Rules of Civil Procedure, accords:

> "The motion for judgment notwithstanding the verdict tests the sufficiency of the evidence in just the same way as does the motion for directed verdict at the close of all the evidence. *In a doubtful case* the *court* may prefer to *deny the motion* for a directed verdict, *and consider the attack on the sufficiency of the evidence subsequently on motion for judgment n.o.v.* This course gives the court more time to consider the matter, the verdict of the jury, if in accord with the judge's own ideas as to the sufficiency of the evidence, may settle the matter, and after verdict the court may grant a new trial on the ground that the verdict is contrary to the great weight of the evidence, instead of directing judgment." [emphasis added]

Indeed, at the time this Court's injunction was entered, a State Court trial judge had before him the Bank's res judicata defense for decision without any presumption afforded the prior interlocutory orders on that question.

In accord is a recent Eleventh Circuit case applying Georgia law, *Cable Holdings of Battlefield v. Cooke,* 764 F.2d 1466, 1473 (11th Cir. 1985). There, the district court, which gave full faith and credit to a Georgia State Court judgment, was reversed:

> "Under the Full Faith and Credit Act, a federal court is required to give res judicata effect to state court judgments only to the extent that the courts of the state in which the judgment was entered would so so ***.
>
> "*** [R]es judicata effect will be given only to final judgments ***. Furthermore, '[d]icta in a recent Georgia Supreme Court case, *Culwell v. Lomas & Nettleton Co.*,

242 Ga. 242, 248 S.E.2d 641 (1978), indicates *that finality for res judicata purposes is measured by the same standard as finality for appealability purposes.' ***."* [citations omitted; emphasis added]

Similarly, since the only State Court judgment pending at the time of this Court's injunction on June 15, 1983, was nonfinal and would not support an appeal—because of the pendency of the unresolved post-trial matters—the State Court judgment was not final and was not entitled to preclusive effect. Accordingly, the State Court's judgment was not entitled to full faith and credit.

The Supreme Court of Alabama in *Food Service Distributors v. Barber,* supra, 429 So.2d at 1027 (Ala. 1983), clarified the position of the Supreme Court of Alabama that a pretrial denial of motion for summary judgment based upon res judicata would not effect a res judicata preclusion of that issue and further expressed the law of Alabama that, where the Court may reconsider its ruling and correct an erroneous ruling, its prior ruling is not a res judicata preclusion of the issue:

"Appellant Food Service contends that the denial of Barber's motion for summary judgment in the first instance should have been the law of the case or res judicata as to any subsequently filed motion for summary judgment. We do not agree.

"There can be no res judicata effect on the denial of summary judgment since, for res judicata to apply, there must have been a final judgment rendered on the merits of the case. *Reliance Ins. Co. v. Substation Products Corp.,* 404 So.2d 598 (Ala. 1981); *Wheeler v. First Alabama Bank of Birmingham,* 364 So.2d 1190 (Ala. 1978). Denial of a motion for summary judgment is not a final judgment.

"We recognize that, in some jurisdictions, denial of a motion for summary judgment becomes the law of the case, and bars rehearing of a subsequent motion for summary

judgment unless new grounds are asserted or new proof offered. See, e.g., *Federal Deposit Ins. Corp. v. Park Lane Realty Associates,* 72A.D.2d 788, 421 N.Y.S.2d 611 (1979); *Fraser v. Doing,* 130 F.2d 617 (D.C. Cir. 1942). We are of the opinion, however, that Illinois provides the better rule; a court may reconsider its ruling on a motion for summary judgment and may correct an erroneous ruling at any time before final judgment. *Roach v. Village of Winnetka,* 366 Ill. 578, 10 N.E.2d 356 (1937)." *Food Service Distributors,* supra, at 1027.

The recently developing insurance law of the State of Alabama arising from application of the Alabama law of res judicata as its applies to the necessity for trying actions on insurance policies and actions for "bad faith" failure to pay or to investigate an insurance claim in one cause of action is in accord. The Alabama courts have held that the bad faith claim is generally a compulsory claim to be brought in the original suit by the plaintiff seeking to collect on an insurance policy and that the failure to do so is a res judicata bar to a subsequent claim for bad faith. *Safeco Ins. Co. of America v. Sims,* 435 So.2d 1219 (Ala. 1983); *Federated Guaranty Life Ins. Co. v. Wilkins,* 435 So.2d 10 (Ala. 1983);[9] but in *Chavers v. National Security Fire & Cas. Co.,* 456 So.2d 293 (Ala. 1984), that Court clarified its prior rulings by holding that a bad faith claim brought subsequent to the conclusion of an action on the policy was not subject to summary judgment based on res judicata,

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[9] In *Federated Guaranty Life Ins. Co. v. Wilkins,* a suit for a declaratory judgment of nonliability on an insurance policy, a counterclaim by an insured for bad faith refusal to pay was stricken by the trial court on a preliminary motion by the insurer. The plaintiff later brought a separate suit for bad faith "identical in language" to the counterclaim which had been dismissed by the trial court in the declaratory judgment proceeding. The Supreme Court pointed out that the declaratory judgment action was not tried to a conclusion and, there being no prior final judgment, the doctrine of res judicata cannot apply to preclude relitigation thereof.

where it was not clear that the plaintiff knew or should have known of the insurance company's alleged bad faith soon enough to join the bad faith issue in the suit on the policy. The cases are consistent with this Court's application of the Alabama law of res judicata preclusion in this case.

Alabama law seems to generally conform to that expressed in several federal decisions.

The decision of a motion for summary application is not to be regarded in the light of res judicata, or as so far conclusive upon the parties as to prevent their drawing the same matter and question again in the more regular form of an action, *Denny v. Bennett,* 128 U.S. 489, 9 S.Ct. 134, 32 L.Ed. 491.

In *Bienville W.S. Co. v. Mobile,* 186 U.S. 217, 22 S.Ct. 820, 46 L.Ed. 1132, it was held that, unless the former record is presented at the hearing of the second case, effect will not be given to it as res judicata, but the court may take judicial notice of its own records and examine and consider the former record where the case was as to plaintiff's splitting its cause of action. Apparently, the record of the federal court in this case was not presented to the State Court for its consideration of res judicata contentions by it.

Preliminary decisions of the trial court denying motions to dismiss or for summary judgment are not final judgments. Where the trial court has not finally adjudicated the res judicata issue and a jury has determined the other defenses in their verdict, the remaining legal question (res judicata) should be called to the trial court's attention by a motion for judgment notwithstanding the verdict. That motion is still pending in the Parsons' State Court proceeding.

This Court finds (1) that, pursuant to the law of Alabama, a State Court's denial of a motion to dismiss and a motion for summary judgment for a defendant based on an alleged res judicata bar would not result in a preclusion of another court's consideration of the res judicata defense; (2) that the State

Court here in question litigated (but not to the extent of final or appealable judgment) substantially the same issues (though pleaded differently) between the same parties (or their privies) as were therefore litigated in this Court to the extent of final judgment; (3) that the State Court has not finally rejected the claim of res judicata; and (4) that the State Court judgment has no preclusive effect under Alabama law.

This accommodates, in this Court's opinion, the Supreme Court's construction of the Anti-Injunction Act vis-a-vis the Full Faith and Credit Act by "*** limiting the relitigation exception of the Anti-Injunction Act to those situations in which the State Court has not yet ruled on the merits of the res judicata issue" *Parsons,* supra, 88 L.Ed.2d at 883-4.

Atlantic Coast Line and Mitchem Decisions

The Supreme Court has ordered this Court, if it finds that the State Court judgment has no preclusive effect, to determine whether an injunction of the State Court proceeding would be barred by the doctrines of equity, comity and federalism. The Trustee argues that certain language in the Supreme Court Opinion in this case effectively leaves this Court no choice but to decide that principles mentioned in *ACL v. Locomotive Engineers,* 398 U.S. 281, 9 S.Ct. 1739, 26 L.Ed.2d 234 (1970), and *Mitchem v. Foster,* 467 U.S. 225, 243, 32 L.Ed.2d 105, 92 S.Ct. 2151 (1972), proscribe this Court's enjoining further prosecution of the State Court case. This Court is of the opinion that, had the Supreme Court been so inclined, the Opinion would clearly have so directed. This Court understands the mandate of the Supreme Court to direct this Court to decide the issue in the light of cited cases.

In *ACL,* the Supreme Court allowed plaintiff (after being denied an injunction against the Union's picketing pursuant to federal law—the Norris-LaGuardia and Clayton Acts—in federal court) to later seek an injunction pursuant to State law in State Court where the State issues were not pleaded or proved

in the federal court. In *ACL*, when a federal court held that ACL (the plaintiff) had no right to an injunction against defendants' picketing, ACL immediately filed in State Court and the injunction was granted. Res judicata was not then pleaded. No motion for judgment notwithstanding the verdict and no appeal was taken from the State Court judgment.

Two years later the Supreme Court in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, concluded that unions had a federally-protected right to picket which could not be interfered with by State Court injunctions. Based on that case, defendants (union) filed a motion to dissolve the State Court injunction (which had become final with no review two years before). The State Judge refused to dissolve the injunction, holding Jacksonville Terminal inapplicable (apparently because the State case, not having been timely appealed, had become final and binding on the parties). The union did not appeal but returned to federal court seeking to enjoin enforcement of the State Court injunction. There were then two final State Court judgments for ACL (granting and allowing injunction), neither of which had been appealed, and one prior federal court judgment for the defendant denying an injunction on the narrow issues involved in the Norris-LaGuardia Act. The union sought the federal injunction to enjoin enforcement of the State Court injunction on alternative theories: (1) to protect or effectuate the federal court's prior judgment denying the injunction, or (2) as necessary in aid of the federal court's jurisdiction. The federal district court enjoined the implementation of the State Court injunction. This was affirmed by the Court of Appeals but reversed by the Supreme Court. A part of the Supreme Court's Opinion stresses the fact that the original judgment of the federal court was narrowly based on federal rights under the Norris-LaGuardia Act and that at no point during the entire argument did either side refer to State law, the effects of that law on picketing or the possible preclusion of State remedies as a result of overriding federal law. The majority of the Supreme Court

concluded that the district court's original judgment simply determined that ACL could not enjoin the picketing because of the fact that the Norris-LaGuardia Act, 29 U.S.C. §§ 101, et seq., prohibited *federal courts'* entering injunctions in labor disputes. Since that Court did not decide whether State Courts could enter such injunctions on other grounds, the federal court's judgment and jurisdiction were not under attack in the State Court. The original federal judgment simply decided that the federal court had no jurisdiction to give injunctive relief in picketing cases. There was no final judgment on the merits of whether some other court might do so. The Supreme Court also placed emphasis in *ACL* upon the fact that the appellant union tried to get the federal district court to decide that the State Court Judge was wrong in distinguishing the *Jacksonville Terminal* decision and pointed out that such an appellate review of a State decision should properly be made by a State Appellate Court.

ACL v. Locomotive Engineers, supra, varies from this case in that the federal court's judgment precluded relief on federal law only while this Court considered facts necessary to prove all claims. In *ACL,* the plaintiff's lawyer in open court stated he relied only on the Norris-LaGuardia Act. Here, the Parsons' lawyer pleaded and proved in the federal trial all facts involved in the State case. The majority of the Supreme Court was of the opinion [in *ACL*] that the federal district court's earlier judgment (upon which the district judge based his injunction of enforcement of a subsequent State Court judgment to effectuate his judgment) involved only the narrow determination that the Norris-LaGuardia Act did not provide the basis for enjoining picketing in a labor dispute (at 289) and not whether picketing might be enjoined pursuant to some other law. The later State Court Judge (and later the Supreme Court) concluded that certain State remedies (admittedly not involved in the federal proceeding) were not issues in the earlier federal case. Little, if any, consideration was given to the question of whether those issues could and should have been considered by the federal court.

Perhaps that issue was not litigated in that case. It is an important issue in Parsons. Additionally, those defendants, having initially prevailed in the federal court, proceeded to final judgment in the State Court before seeking a federal injunction; whereas, instant State Court Defendants [the Bank] raised the res judicata issue as soon as possible in the State proceedings and sought federal intervention only when interference with the federal judgment appeared to be a realistic probability.

The current case varies from *ACL* in at least four important features: (1) While in *ACL* no attempt was made to involve State law or remedies (and apparently no showing that it could have been), the Parsons involved every aspect of the later State case into the earlier federal trial. So vague were the Parsons' claims in each case that his Court was unable to be certain of identity of common issues until it required the Trustee to specifically itemize his State Court contentions after the trial of both cases and compared these contentions specifically with the Parsons' evidence in the federal trial. [Opinion, March 29, 1985, USDC MD ALA. No. 83V-181-N]. (2) In *ACL*, the State Trial Court entered two final judgments on somewhat different issues against defendant union, neither of which was appealed. Both appear to be final binding State judgments against the defendant, initially reviewable in the State Appellate Courts. But there was no final federal judgment on the merits of an injunction—simply a decision that no injunction was available in federal court pursuant to the Norris-LaGuardia Act. In *Parsons,* there was a federal judgment on the merits against the Parsons. (3) In *Parsons,* interlocutory orders denying motions to dismiss and for summary judgment raising the issue of the res judicata preclusion were entered by the State Court. There is no suggestion that those orders were wrong in the State proceedings then before that Court. The State of Alabama Rules, patterned on Federal Rules of Civil Procedure, provide very limited help to one seeking to protect himself from defending vague claims. The res judicata question had been presented on every occasion but was not ripe for ruling. The Defendants

sought the federal injunction as soon as they were able to crystalize the issues in both cases. This was not true in *ACL*. (4) The *Parsons* Opinion (at 884), citing *ACL*, states that the relitigation exception to the Anti-Injunction Act, "to protect or effectuate its judgments," authorizes a federal injunction of State proceedings only "to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." In the instant case, the State decision, if made final, will completely emasculate the final judgment for the Bank of this Court and the United States Court of Appeals for the Eleventh Circuit. A careful comparison of the issues presented by the Parsons convinces this Court that those cases, through careful and skillful pleadings, were planned to afford the Parsons opportunities to try the same issues in two courts for damages resulting from the same set of circumstances—hence, an harassment as proscribed in *Dombroski v. Pfister*, 380 U.S. 479.

Both the majority and the dissenting opinion of justices Brennan and White in *ACL* seem to agree that a federal court has a discretion to enjoin State proceedings if it acts pursuant to an explicit exception to the prohibition of § 2283, that is, "to protect or effectuate its judgments". The majority took the view that the federal district court had decided only the Norris-LaGuardia Act question (leaving open the State questions) while the dissenters were of the opinion that the federal court had decided the union's right to picket by final judgment which was entitled to res judicata preclusive effect in the State Court enforceable by federal injunction to the parties in the State proceeding. Apart from principles of equity, comity and federalism implicitly embedded in the Anti-Injunction Act and its exceptions, either those principles played no part in that decision or the Court saw no reason to dwell upon them.

This Court is of the firm opinion that the ruling in *ACL* is not controlling of this case.

The Trustee also insists that the Supreme Court has cited *Mitchem v. Foster,* 407 U.S. 225, as a bar to this Court's proceeding in the injunction matter. This Court understands that the Supreme Court clearly mandated that this Court consider the "principles of equity, comity and federalism discussed in *Mitchem v. Foster,*" supra, at 243. Because general principles of equity, comity and federalism are not discussed at page 243 in *Mitchem,* this Court will attempt to consider the facts of the Parsons case in the light of *Mitchem* without limiting itself to the theories to which the Supreme Court may have been particularly intimating their interest by referring to page 243.

This Court understands that the Supreme Court has mandated that this Court consider the facts in this case in the light of the principles recognized in *Younger v. Harris,* infra, and its companion cases, and, perhaps, in the light of the history of *Toucey v. New York Life Ins. Co.,* infra, and the legislation resulting therefrom, all as discussed in *Mitchem.* This Court understands that, if it is to continue its injunction in force, it must walk a narrow line: The relitigation exception to the Anti-Injunction Act, as construed by the Supreme Court is limited purely to pending relitigation by the Full Faith and Credit Act; principles of equity, comity or federalism expressed in the *Younger* doctrine bars federal court injunctive interference with State Court litigation except where irreparable injury is both great and immediate, where the State law is flagrantly and patently violative of expressed constitutional prohibitions, or where there is a showing of bad faith, harassment or other unusual circumstances that would call for equitable relief. *Mitchem,* supra, at 230. This Court, so limited, may maintain an injunction to perfect or effectuate its judgment.

The *Mitchem* Court [at 237] enunciated three relevant criteria in determining whether a statutory remedy falls within an expressly authorized exception to the Anti-Injunction statute: (1) The federal law need not contain an express reference to that statute [§ 2283]; (2) a federal law need not expressly authorize an injunction of a State Court proceeding in

order to qualify as an exception; and (3) Congress must have created a specific uniquely federal right or remedy enforceable in a federal court of equity that could be frustrated if the federal court were not empowered to enjoin the State proceeding. In *Parsons,* the federal law is contained in the relitigation exception to the statute § 2283 itself; while it does not authorize an injunction specifically, it clearly allows one; and the *Parsons* Court, in discussion of the *Toucey* decision and its resulting legislation, demonstrates that Congress created a specifically and uniquely federal right or remedy enforceable in a federal court of equity that could be frustrated if the federal court were not empowered to enjoin the State Court proceeding. The *Parsons* Court, in discussing *Toucey,* made the following statement: "Congress in 1948 amended the Anti-Injunction Act to overrule this Court's decision in *Toucey* ***," *Parsons,* supra, 88 L.Ed.2d at 884; "In *Toucey* the controlling question was 'does a federal court have the power to stay a proceeding in a State Court simply because the claim in controversy has previously been adjudicated in the federal court?' " [at 126]. The *Toucey* Court concluded that, with exception not here pertinent, "proceeding in State Courts should be free from interference by federal injunction" [at 132]. The *Toucey* Court then pointed out that:

> "As part of the delicate adjustments required by our federalism, Congress has rigorously controlled the 'inferior courts' and their relation to the courts of the States," and that "Congress *** exhibits much circumspection in avoiding occasions for placing the tribunals of the States and of the Union in any collision" [at 141].

Parsons then points that Justice Reed's dissenting opinion suggests that, while the majority was concerned with one court's federal interference with the jurisdiction of another court [State], the true purpose of the implied relitigation exception then in effect was to preclude the parties [as distinguished from a court] from relitigating issues already decided [at 142-143].

The *Parsons'* Supreme Court's recognition that the 1948 amendment of the Anti-Injunction Act to statutorily reinstate the theretofore implied relitigation disapproved in *Toucey* would imply that the Supreme Court recognized the relitigation exception to allow a federal court to enjoin [at least, the parties in] a State Court proceeding for the purpose of effectuating the federal court's prior judgment as to the same issues between the same parties and their privies if the law of the subject State does not recognize a res judicata bar by a State Court determination.

The *Mitchem* Court also pointed out that "in *** *Perez v. Ledesma,* 401 U.S. 82, [the Court] said that 'only in cases of proven harassment or prosecutions undertaken by State officials in bad faith without hope of obtaining a valid conviction or perhaps in other extraordinary circumstances where irreparable injury can be shown is federal injunctive relief against pending State prosecutions appropriate' [401 U.S. at 85]." *Mitchem* and other cases extended these principles to civil cases.

Equity, Comity and Federalism

Comity and federalism do not afford a one-way street. The federal courts will recognize and respect the prior exercised jurisdiction of the State Courts. 28 U.S.C. § 1738. But comity and federalism do not end there. State Courts must also recognize and respect the prior exercised jurisdiction of federal courts. Federal courts have a right and duty to protect their judgments. The Supremacy Clause [U.S. Constitution, Article VI] demands due respect of federal laws including judgments. Implicit is the fact that the first judgment in time, whether State or federal, will bar retrial of substantially the same issues (assuming concurrent jurisdiction) between substantially the same parties. The Supreme Court in *Parsons* makes clear that, if the second court to try the same cause has the records before it and is totally free to make the res judicata decision, the first court with the prior judgment can do nothing to protect its own jurisdiction, and a new series of trials and appeals must be processed in courts completely unaware of the issues involved.

In determining whether the Parsons' prosecution of the State Court case constitutes harassment or other extraordinary circumstances which would justify a federal court's rare intervention into a State Court civil proceeding, this Court must consider all the circumstances involved. The Parsons were in a steel fabrication business in Montgomery where they were financed by The First National Bank of Montgomery [the name of which has now been changed to First Alabama Bank of Montgomery]. The Parsons were having financial problems and seeking to refinance for several months and were told by the Bank that it could not continue a line of credit to them. During negotiations an officer of the Bank told the Parsons that one Mr. Orange had a record of renovating financially troubled businesses and, thereafter, Mr. Orange and the Parsons sought for several months to make a satisfactory business arrangement with forebearance of the Bank but with the understanding that the Bank would not continue the financing of the Parsons. Upon failure of the Parsons to arrange refinancing and upon receiving information that Mr. Orange could not make an agreement with the Parsons, the Bank notified the Parsons that it must insist upon satisfaction of its indebtedness. The Parsons thereupon agreed to a private sale of the mortgaged assets of the Montgomery business to Mr. Orange and filed bankruptcy which ultimately would discharge the corporate debts of the Montgomery business. Later, Parson filed two suits.

The resulting harassment and irreparable injury has been described by Justice Reed. Congress adopted as the law of the land the bulk of the dissenting Opinion of Justice Reed in *Toucey* [314 U.S. at 144]:

> "This alternative is that a federal judgment entered perhaps after years of expense in money and energy and after the production of thousands of pages of evidence comes to nothing that is final. It is to be only the basis for a plea of res judicata which is to be examined by another court, unfamiliar with the record already made, to determine whether the issues were or were not settled by the

> former adjudication. We, too, desire that the difficulties innate in the federal system of government may be smoothed away without a clash of sovereignties but we find no cause for alarm in affirming a court which forbids parties bound by its decree to fight the battle over on another day and field."

Congress appeared to agree with Justice Reed that a federal court winner should not be forced to bring plea of res judicata in a State Court, "unfamiliar with the record already made," and if eventually unsuccessful seek review in the United States Supreme Court of an adverse State judgment. The Supreme Court in the case at bar expressly noted that it "fully accept[ed] the logic of Justice Reed's dissent ***" [88 L.Ed.2d at 884]. The quoted language from Justice Reed's dissent in *Toucey* is an oversimplification of the facts of, and an understatement of the harassment involved in, the *Parsons* litigation.

Remarkably, the Parsons' interests including the Trustee—Defendants here and Petitioners in the Supreme Court—did not even present for review there the federal question "of whether the courts below were correct in ultimately finding that the State Action was barred by the federal judgment under principles of res judicata and collateral esoppel ***" [brief of Parsons, p. 28, n. 20]. In fact, on October 15, 1985, the current lawyer for the Parsons' interests in this Court, Hon. Donald R. Harrison, filed an amended complaint in a State action against Parsons' earlier attorneys in this case [Bank's Exhibit 15 herein] which admitted the bar of this Court's judgment:

> "56. That both actions filed on behalf of the plaintiffs by defendants arose out of the same transaction or circumstances or were related to the same subject matter, however, the claim the State Court alleged only fraud and violations of Alabama law in connection with the foreclosure, repossession and sale of certain assets, while the Federal Action, although making allegations related to the State Action, sought only damages for violations under

Federal law of the Bank Holding Company Act, 12 U.S.C. § 1972-75 (1976).

"57. That the defendants knew or should have known of the pendents [sic] jurisdiction of the United States District Court and its original jurisdiction to hear to attendant state allegations, and knew or should have known the Federal claim along with the State claims, subject to their removal to the Federal Court upon motion of the defendants therein.

"58. That the defendants knew or should have known of the legal theories of res adjudicata [sic] and collateral estopped [sic] and that by filing said claims in two separate courts they were assuming the probability that one case would be tried before the other thereby invoking either res adjudicata [sic], and that defendants could have and should have brought and tried all claims arising from the said transaction or subject matter in one forum only." [¶¶ 56-58, Motion to Amend Complaint, *Parsons Steel v. Beasley,* CV 85-386-G].

Even after the remand by the Supreme Court in the case at bar, Mr. Harrison filed an affidavit of Parsons himself on March 10, 1986, which recognized the correctness of the holdings of this Court and of the Court of Appeals that "under [pendent] jurisdiction of the Federal Court, all could have and should have been brought in Federal Court ***."

Those documents, of course, were filed in a case wherein the Parsons are seeking $23,500,000.00 from their own attorneys in the various *Parsons v. First Alabama Bank* cases, which cases rely for their potency upon the propriety of jurisdiction of State relitigation. Nonetheless, it would appear therefrom that the parties do not question the correctness of the holding of this Court and the Court of Appeals that the judgment in the federal bank holding company actions bars the attempted relitigation in State Court of matters which were or could have been litigated

in the federal action.[10] The relevancy of this is limited by the Supreme Court's Opinion to the question of the equity of requiring relitigation under the peculiar circumstances hereof by two new courts (the third State Trial Judge and the proper Alabama Appellate Court) when this Court, the United States Court of Appeals and the United States Supreme Court have already litigated the case and are generally familiar with the issues. Equity favors the continued effectiveness of this Court's permanent injunction of June 15, 1983. It should remain in effect and the slightest undermining of it—to permit further litigation which the parties appear to concede should be barred as attempted relitigation—would mock equity and the entire judicial process.

As long as barebones pleadings are allowed, ingenious lawyers will state complaints (where sufficiently large sums are involved and both federal and State violations may arise from the same circumstances) so as to afford a trial in a federal court and a trial in a State Court both arising from the same wrong and resulting in the same damage. If damages are awarded at the first trial and if, as here, the same actual damages are claimed to have resulted from the same alleged wrongs in each case, there is no occasion to try the second case because the plaintiff would have already achieved his object. If, however, as here, the plaintiff loses the first case tried, plaintiff's attorneys will attempt to distinguish between the two causes of action, though plaintiff has been wronged only once, and will hope to convince a jury of the righteousness of their client. Complicated circumstances and allowance of vagueness in pleadings are fascinating tools of skillful attorneys in such cases. The evils arising from the practice accrue, not only against the twice tried Bank, but also against the public, the already overtaxed court system and the government itself.

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[10] The Trustee in Bankruptcy joined in the petition for certiorari filed in the Supreme Court of the United States but is not shown to be party to the State Court proceeding against Parsons' former lawyers.

Since the relitigation exception is construed to allow injunctions only before a State Court enters final judgment, if, as once suggested by the Trustee, the Bank hazards waiving its right to an injunction by not filing for an injunction before beginning the proceeding in the State Court, the relitigation exception is of little protection to an original prevailing defendant in a proceeding wherein skillful pleaders have successfully secreted their relitigation by phrasing the same issues vaguely and differently in separate suits in separate courts but, nonetheless, involving the same issues, evidence and parties. Equity and justice require that some leeway must be given a successful party in the first suit to determine identity of issues, parties, etc., before he is held to have waived his right to enjoin parties in a second similar suit.

Equitable estoppel, res judicata, relitigation and comity are necessarily closely related and are dependent upon equitable principles. One requisite of all equity is that one who seeks equity must do equity. Here, one who sought relief initially in the federal courts and failed has sought to retry his federal case in the State Court by disguising it as a State cause of action although the same issues and evidence had been fully litigated in the federal court. The Trustee, who declined to participate in the federal trial after participating in the pretrial proceedings and discovery therein, was privy to the Plaintiffs in the federal proceeding and is also, therefore, barred by equitable principles from claiming an equity in this matter.

Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), and its companion cases, do not effect an abdication of the federal role in protecting citizens from official lawlessness or other official misconduct. Nor does it affect an abdication of a court's duty to demand respect for its judgments. The *Younger* doctrine is a simple restatement of what has long been the law, namely, that a State criminal (or civil) prosecution begun in good faith will not be enjoined, even on constitutional grounds by a federal court, except under extraordinary circumstances where the danger of irreparable injury is both great and im-

mediate. *Fenner v. Boykin,* 271 U.S. 240, 243-244 (1926); *Douglas v. City of Jeannette,* 319 U.S. 157, 163-164 (1943). In *Younger,* the Supreme Court determined that a good faith prosecution under a possibly unconstitutional statute should not be enjoined absent special circumstances. The Court based its decisions upon two grounds: Comity [the respect for the judicial processes of the States] and Equity [the existence of an adequate remedy at law—the presentation of the federal constitutional question to the State court]. 401 U.S. 37, at 43-44. A study of *Younger* demonstrates that *Dombrowski v. Pfister,* 380 U.S. 479 (1965) is still the law and that *bad faith* prosecution is the type of immediate and irreparable harm which justifies federal intervention to protect federally secured rights. 401 U.S. 37, at 48-49. See, *The Supreme Court,* 1970 Term, 85 HARVARD LAW REVIEW 40, at 301-315 (1971). Where a plaintiff seeks to enjoin the enforcement of a State law or a State Court judgment or to enjoin pending and further prosecutions pursuant thereto, and where plaintiff's allegations are sufficient to invoke the equity jurisdiction of a federal court to protect federally secured rights, a federal district court is required to examine the pleadings and proof in order to make the necessary findings on bad faith prosecution, harassment and irreparable injury prior to granting or denying the requested relief. *Dyson v. Stein,* 401 U.S. 200 (1971); *Byrne V. Karalexis,* 401 U.S. 216 (1971). This Court understands that it has done so to the extent suggested by the issues made by the parties and the Court of Appeals [unpublished Opinion #83V-181-N, March 29, 1985].

Among the pre-*Younger* cases which allowed federal court interference but recognized the doctrine, later better articulated perhaps in *Younger,* was *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). In that case, the Supreme Court held that the remedy at law was inadequate and an injunction was available because of the severe penalties for violation of the law and the lengthy and difficult litigation that would be required to determine the validity of the law in a criminal proceeding. 209 U.S. at 163-165. This was the status of the law

before the *Toucey* decision and was reenacted by Congress in the relitigation exception to the Anti-Injunction Act even if that exception had no other effect.

In *Perez v. Ledesma,* 401 U.S. 82, at 85, the Court stated:

> "Only in cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances where irreparable injury can be shown is federal injunctive relief against pending state prosecutions appropriate."

In *Samuels v. Mackell,* 401 U.S. 66, at 69, the Court held that federal courts should not enjoin State Court criminal prosecutions begun prior to institution of the federal suit except in very unusual situations and to prevent immediate irreparable injury.

In *Younger v. Harris,* supra, at 46, after citing cases clearly cautioning against federal injunctions against State Court criminal prosecutions, the Court mentioned the necessity for a showing of irreparable injury, both great and immediate. In explaining that requisite, the Court pointed out that the cost, anxiety and inconvenience of having to defend against a single criminal prosecution would not ordinarily involve irreparable injury and "the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution."

Here, in circumstances causing a then-plaintiff, Mr. Parsons, to say his life had been in turmoil for the first four years of these related proceedings (now extended to seven years and two trips to the Supreme Court of the United States) one can hardly conclude that anyone's rights can be determined by any "single" court proceeding. Obviously, this case is unavoidably destined, throughout State or federal lower court process, toward other proceeding in the Supreme Court of the United States. The attorneys for all parties have on one occasion discouraged this Court's certification of a doubtful State law question to the

Supreme Court of Alabama. They obviously recognize the costs, the mental and physical strain and harassment to the parties, of acquainting another court or series of courts with the facts and the law pertinent to this case.[11] They recognize the equity of proceeding in this case before judges already conversant with the problems shared by the parties. There can be no "single" proceeding to relieve the Bank and its former Vice President of the seven-year, multi-million dollar ordeal prosecuted by the Parsons who now sue their lawyers in the two trials and who now also sue the Bank in the Southern District of Alabama for matters arising from this litigation.[12] The harassment arising from these prosecutions involves irreparable injury, both great and immediate to the Bank. The multiplicity and duration of this litigation is itself an indictment of the multiple court system and of this Court. Equity, comity and federalism do not require withdrawal of this injunction.

This Court is of the opinion that the Parsons' lawyers originally filed the damage suit in the State Court for fraud and for violation of the UCC hoping to take advantage of punitive damages allowed in that proceeding. Subsequently, for fear of loss of an opportunity to litigate the circumstances as a Bank Holding Company Act violation, Parsons' attorneys filed the suit in the federal court. For fear that they would lose the opportunity to present to a jury the apparently hasty mortgage foreclosure and sale of Parsons' assets to satisfy the secured

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[11] The State Court Judge who entered the State Court judgment is now unavailable to consider the motion for judgment notwithstanding the verdict, by reason of assent to the State Criminal Court of Appeals.

[12] This Court has no knowledge of the merits or demerits of those suits. They are pending in other courts and may not be relieved by this Court.

debt,[13] the Parsons pleaded in the federal Parsons litigation all facts which they said justified the State proceeding, but they did not attempt to identify those factors as a violation of the UCC in the federal litigation. They hoped thereby to thereafter be able to litigate the same facts in the State case if they were unsuccessful in the federal case. This is, in the opinion of this Court, the exact type of "harassment or other unusual circumstances" which the relitigation exception to the Anti-Injunction Act is designed to prevent.

Accordingly, judgment will enter in favor of the Bank and the injunction will continue in force. An Order and Judgment will be entered in accordance with this Opinion.

DONE this 17th day of July, 1986.

R.E. Varner
United States District Judge

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[13] To which Mr. Parsons specifically agreed.